(1)

90-769
No.

Supreme Court, U.S.
FILED
NOV 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

VS.

BOB GEARY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUISE H. RENNE
City Attorney
Counsel of Record
DENNIS AFTERGUT
THOMAS J. OWEN
Deputy City Attorneys
206 City Hall
San Francisco, CA 94102
Telephone: (415) 554-4213
Counsel for Petitioners

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Does the California Constitutional provision prohibiting political parties from endorsing, supporting or opposing candidates for nonpartisan office violate the First Amendment?

LIST OF ALL PARTIES

Petitioner Louise H. Renne is the City Attorney for the City and County of San Francisco. Petitioner City and County of San Francisco is a municipal corporation and a political subdivision of the State of California. As such, it is responsible for conducting federal, state and local elections within its jurisdiction. The remaining petitioners, sued in their official capacities, include the Mayor and the Registrar of Voters of the City and County of San Francisco. Petitioner Board of Supervisors, also sued in its official capacity, is the legislative body of the City and County. Although the validity of a provision of the California Constitution is at issue in this case, neither the State of California, nor any of its officers, were served or appeared.

Respondents Bob Geary, Robert Silvestri, Dennis Mark, Melissa Gundrun, Wayne Johnson, David Soule, Max Woods, Peter Johnson, Robert Gebert, and Terence Faulkner are residents and registered voters of the City and County of San Francisco. Respondent Election Action identifies itself as an organization dedicated to placing measures on the ballot by initiative, and to campaigning for and against ballot propositions. Respondent Sudi Trippet is the coordinator of Election Action.

TABLE OF CONTENTS

	Page
Question Presented	i
List Of All Parties	ii
Table Of Contents	iii
Table Of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional, Statutory, Etc., Provisions Involved	2
Statement Of The Case	3
Reasons For Granting The Writ	4
This Case Presents An Important Question Of Federal Law Affecting The Very Nature Of Local Government And The Judiciary In California	4
California Has A Compelling Interest In Preserving Nonpartisan Local Elections By Banning Official Party Endorsements	6
A Ban On Party Endorsements Is The Least Restrictive Alternative Consistent With The Preservation Of Nonpartisanship	14
Conclusion	17

TABLE OF AUTHORITIES

Cases

Page

Austin v. Michigan Chamber of Commerce, 110 S.Ct. 1391 (1990) 12, 13, 14

Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973) 8, 14, 15, 17

Concerned Democrats of Florida v. Reno, 458 F.Supp. 60 (S.D.Fla. 1978) 6

Eu v. San Francisco Democratic Central Comm., 489 U.S. 214 (1989) 11

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 13, 14

Oregon v. Mitchell, 400 U.S. 112 (1970) 5

Stevenson v. State Board of Elections, 794 F.2d 1176 (7th Cir. 1986) 17

Storer v. Brown, 415 U.S. 724 (1974) 11, 17

Unger v. Superior Court, 102 Cal.App.3d 681 (1980) 4

Unger v. Superior Court, 37 Cal.3d 612 (1984) 5

Statutes

United States Constitution:
- Article IV, section 4 (Guarantee Clause) 6
- First Amendment 5, 6, 7
- Tenth Amendment 6

United States Code:
- 5 U.S.C. § 7324 (Hatch Act) 8

California Constitution:
- former Article II, section 2¾ 4
- former Article II, section 6 4
- Article II, section 6(a) 5
- Article II, section 6(b) ..... *passim*

TABLE OF AUTHORITIES

STATUTES

Page

California Elections Code:
- Section 35 12
- Section 37 16
- Section 605 13
- Sections 6430 *et seq.* 12
- Sections 8500-8945 12
- Sections 9000-9510 12
- Sections 9600-9745 12
- Sections 9750- 9855 12
- Section 10000 12
- Section 10007 13
- Section 10010.5 13
- Section 10012 16
- Section 10200.5 16

California Revenue and Taxation Code:
- Sections 18701 *et seq.* 13

California Miscellaneous Statutes:
- Statutes of 1913, chapter 690 ..... 4, 8

California State Voters Pamphlet, June 1986:
- Proposition 49 10

Florida Statutes Annotated:
- Section 105.071 6

Montana Codes Annotated:
- Sections 13-35-231, 3-10-201(4) 6

South Dakota Codified Laws Annotated:
- Section 12-9-2 6

Miscellaneous:
- *The Federalist,* (Cooke ed. 1981) 7
- Owens, J., Constantini, E., and L. Wechsler, *California Politics and Parties* (1969) 8
- Tribe, L., *American Constitutional Law* (2d ed. 1988) .. 6

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the
CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

VS.

BOB GEARY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Louise H. Renne, City Attorney for the City and County of San Francisco, *et al.*, respectfully pray that a Writ of Certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Ninth Circuit is reported at 911 F.2d 280, and is reprinted in Appendix A hereto, p. A-1.

The initial Ninth Circuit opinion is reported at 880 F.2d 1062, and is reprinted in Appendix B hereto, p. A-67. The order granting the petition for rehearing and setting a rehearing *en banc* is reported at 895 F.2d 1230, and is reprinted in Appendix C hereto, p. A-113.

The order of the United States District Court for the Northern District of California (Zirpoli, D.J.) is reported at 708 F.Supp. 278, and is reprinted in Appendix D hereto, p. A-114.

JURISDICTION

Respondents brought this suit on September 11, 1987, in the Northern District of California invoking federal jurisdiction under 42 U.S.C. Sections 1983 and 1985. The District Court's jurisdiction was based on 28 U.S.C. Sections 1331 and 1343. On April 27, 1988, the Northern District issued its judgment in favor of respondents on their third cause of action, the subject of the instant proceeding. *See* Appendix D, p. A-114, *infra*.

On petitioners' appeal, the Ninth Circuit, on July 24, 1989, entered a decision reversing the Northern District's judgment. *See* Appendix B, p. A-67, *infra*. Rehearing *en banc* was granted on February 6, 1990. *See* Appendix C, p. A-113, *infra*. The *en banc* decision, affirming the Northern District's judgment, was issued August 14, 1990. *See* Appendix A, p. A-1, *infra*.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY, ETC., PROVISIONS INVOLVED

1. Article II, section 6, of the California Constitution provides as follows:

> (a) All judicial, school, county, and city offices shall be nonpartisan.
>
> (b) No political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office.

2. Article IV, section 4, of the United States Constitution (the Guarantee Clause) provides as follows:

> The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

3. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Respondents filed suit against the City and various City officials in 1987, alleging three causes of action. At issue here is the third cause of action, which alleged that Article II, section 6(b), of the California Constitution violates the First Amendment. Section 6(b) provides that "[n]o political party or party central committee may endorse, support or oppose a candidate for nonpartisan office."

Respondents' motion for partial summary judgment on the third cause of action was granted by the Hon. Alfonso J. Zirpoli, by order dated April 27, 1988. The City's subsequent motion to vacate the judgment was denied, and the City filed its notice of appeal on June 22, 1988.

On June 24, 1989, a three-judge panel of the Ninth Circuit issued a decision upholding the constitutionality of section 6(b). The Ninth Circuit granted a rehearing *en banc* at Respondents' request on October 13, 1989. The eleven-judge *en banc* court issued its decision on August 14, 1990, reversing the panel's decision.

Appendix A

Bob GEARY; Robert Silvestri; Dennis Mark; Melissa Gundrun: Wayne Johnson; David Soule; Max Woods; Peter Johnson; Robert Gebert; Election Action; Terence Faulkner; and Sudi Trippet, Plaintiffs-Appellees,

v.

Louise RENNE, San Francisco City Attorney; Dianne Feinstein, San Francisco Mayor; Board of Supervisors, City and County of San Francisco; City and County of San Francisco, and Jay Patterson, San Francisco Registrar of Voters, Defendants-Appellants.

No. 88-2875.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 25, 1990.

Decided Aug. 14, 1990.

As Amended Aug. 31, 1990.

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN, Chief Judge, WALLACE, TANG, SCHROEDER, ALARCON, REINHARDT, BRUNETTI, KOZINSKI, LEAVY, FERNANDEZ and RYMER, Circuit Judges.

GOODWIN, Chief Judge:

Since at least 1913, California by statute or state constitutional provision has made all city, county, school, and judicial offices nonpartisan. Political parties have no control over the nomination or election processes for those offices. Prior to 1986, however, no law prohibited political party endorsements of candidates running for such offices. Nevertheless, because the legal status of such endorsements was unclear, political parties did not endorse candidates in 75% of California counties. In 1986, the people of California voted overwhelmingly to adopt Proposition 49, which amended the state constitution to formalize the ban on political party endorsements: Article II, § 6(b) provides that "[n]o politi-

cal party or party central committee may endorse, support or oppose a candidate for nonpartisan office."

Plaintiffs-appellees in this case are ten registered voters of the City and County of San Francisco, an organization of registered voters, and one of that organization's officers. The basis of their complaint as it relates to this appeal was the refusal of the City and County of San Francisco and the San Francisco Registrar of Voters (appellants) to permit official political party and party central committee endorsements to be printed in the San Francisco Voter Pamphlet prepared for elections scheduled June 2 and November 3, 1987. Appellants based their refusal to print such endorsements on the language of Article II, § 6(b).

On September 11, 1987, plaintiffs-appellees filed suit, and in their third cause of action challenged the constitutionality of § 6(b) and sought injunctive and declaratory relief. They alleged that § 6(b) violates the rights of political parties and their members to free speech and association under the first and fourteenth amendments of the Constitution[1] and to equal protection under the fourteenth amendment.

On April 27, 1988, the district court granted the plaintiffs' motion for partial summary judgment with regard to their third cause of action 708 F.Supp. 278, relying in large part on the reasoning of state Supreme Court Justice Grodin's concurring opinion in *Unger v. Superior Court*, 37 Cal.3d 612, 209 Cal.Rptr. 474, 692 P.2d 238 (1984).[2] On May 6, 1988, the city moved to vacate the district court's judgment and was unsuccessful. This appeal followed.

---

[1] The first amendment is made applicable to the states through the fourteenth amendment. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 n. 43, 102 S.Ct. 3409, 3422, 73 L.Ed.2d 1215 (1982); *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963).

[2] In *Unger*, a plurality of the Court held that the state constitutional provisions making city, county, school, and judicial offices nonpartisan did not prohibit the making of endorsements by political parties. Justice Grodin wrote separately in order to express his view that a ban on such endorsements would violate the first amendment.

The original panel of this court reversed the judgment, holding that California's compelling interest in preserving its nonpartisan system of government for local and judicial offices justified the infringement of the plaintiffs' first amendment rights effected by § 6(b). 880 F.2d 1062. We took this case en banc in order to reconsider the panel's decision. Upon reconsideration, we affirm the decision of the district court.

The broad authority of the states to prescribe the procedures governing local elections "does not extinguish the State's responsibility to observe the limits established by the first amendment rights of the State's citizens." *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 109 S.Ct. 1013, 1019, 103 L.Ed.2d 271 (1989). In reviewing a challenge to a provision of a state's election laws, we first consider whether the provision burdens rights protected by the first and fourteenth amendments. *Id.* If the enactment at issue impairs the first amendment rights of political parties and their members, "it can survive constitutional scrutiny only if the State shows that it addresses a compelling state interest . . . and is narrowly tailored to serve that interest." *Id.* 109 S.Ct. at 1019-20 (citations omitted); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978).

It is indisputable that the restrictions embodied in § 6(b) implicate appellees' first amendment rights. The ban on endorsements directly affects political speech, "the inviolability of which rests at the core of the First Amendment." *San Francisco Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 833 (9th Cir.1987), *aff'd*, 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989). As the Supreme Court has made clear, "[a]dvocacy of the election or defeat of candidates . . . is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy or defeat of legislation." *Buckley v. Valeo*, 424 U.S. 1, 48, 96 S.Ct. 612, 648, 46 L.Ed.2d 659 (1976). And because the exercise of these basic first amendment freedoms traditionally has been through the media of political associations, political parties as well as party adherents enjoy rights of political expression and association. *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211, 1 L.Ed.2d 1311 (1957).

Because § 6(b)'s prohibitions do impair appellees' first amendment rights, the burden is on the government to show a compelling state interest justifying the regulation. *Eu*, 826 F.2d at 833 (quoting *Bellotti*, 435 U.S. at 786, 98 S.Ct. at 1421). Appellants declare § 6(b) essential to preserving the nonpartisan nature of California's system of electing local and judicial officials and assert that the State's interest in the "fair and impartial administration of government" is compelling enough to warrant § 6(b)'s ban on partisan endorsements.

Attempting to avoid the constitutional minefield of claiming first amendment restrictions to be justified for the purpose of preventing "undue influence on voters" and guiding the electorate to make sensible choices, *see, e.g., Bellotti*, 435 U.S. at 789-91, 98 S.Ct. at 1422-24, appellants characterize their concern as an interest in the *end product* of § 6(b)'s restrictions on political party speech: i.e., prevention of a return of political party domination of local government and diminished voter confidence in local public officials. *See, e.g.*, Amicus Curiae Brief of Tom Bradley, Mayor of Los Angeles, at 3 (California's concern "does not relate to the impact that endorsements may have on voters' choices but rather to the indirect impact on elected officials' independence from partisan political pressures").

As support the State cites Supreme Court cases upholding limits on campaign contributions and spending, contending that political party endorsements create the same risks of corruption that the Court previously has determined justify governmental regulation of election spending. The analogy is flawed. In its most recent pronouncement in this area, *Austin v. Michigan Chamber of Commerce*, ___ U.S. ___, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), the Court upheld a provision of the Michigan Campaign Finance Act prohibiting corporations from using general treasury funds for independent expenditures in connection with state candidate elections. In its defense Michigan contended that the unique legal and economic characteristics of corporations necessitated some regulation of their political expenditures in order to avoid corruption or the appearance of corruption. *Id.* at 1397. Affirming that, in previous cases, "[w]e . . . have recognized that 'the compelling governmental interest in preventing corruption

support[s] the restriction of the influence of political war chests funneled through the corporate form,' " *id.* (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500-01, 105 S.Ct. 1459, 1470, 84 L.Ed.2d 455 (1985) (*NCPAC*)), the Court found the Michigan statutory provision a legitimate check upon "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the [state-conferred] corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 1397.

The corruption the Court found properly addressed by the Michigan statute was not of the kind decried by California here. Under the definition applied in past cases, "[c]orruption is a subversion of the political process" whereby "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *NCPAC*, 470 U.S. at 497, 105 S.Ct. at 1468; *see also Austin*, 110 S.Ct. at 1421 (Kennedy, J., dissenting). "The hallmark of corruption is the financial *quid pro quo:* dollars for political favors." *NCPAC*, 470 U.S. at 497, 105 S.Ct. at 1468.

By contrast, the Court explicitly has excluded from its definition the kind of conduct California seeks to prevent with § 6(b): "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages . . . can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *Id* at 498, 105 S.Ct. at 1468. The rationale underlying "the long history of regulation of *corporate* political activity" thus simply is not available as a justification for the complete suppression of speech by political parties, regardless of whether the elections in question are partisan or nonpartisan in nature. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256, 107 S.Ct. 616, 627, 93 L.Ed.2d 539 (1986) (*MCFL*) (emphasis added). As the Court said in exempting Massachusetts Citizens for Life, a nonprofit organization dedicated to promoting respect for the rights of the unborn, from Federal Election Campaign Act (FECA) prohibitions on corporate expenditures of treasury funds on behalf of federal candidates:

> [such groups] do not pose [any] danger of *corruption*. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.

Id. at 259, 107 S.Ct. at 628-29 (emphasis added). That description applies equally well to the political parties targeted by § 6(b).

In *Eu* we considered a similar ban on partisan endorsements before party primaries in California. Finding that "[w]ith the exception of cases upholding laws carefully tailored to proscribe fraud and corruption," the State had "cite[d] no authority for the proposition that the government can regulate the flow of information between political associations and their members," we held that the ban "patently infringe[d] both the right of the party to express itself freely and the right of party members to an unrestricted flow of political information." 826 F.2d at 835.

Appellants assert that *Eu* is distinguishable because it involved party endorsements in elections for *partisan* offices and because the state interest advanced here—i.e., in preventing the appearance or reality of "corruption" of nonpartisan officeholders—is more compelling. Having dealt with the latter contention above, we observe with regard to the first that there is nothing in this court's *Eu* opinion or the Supreme Court's affirmance of that opinion which suggests that either analysis was in any way dependent upon the fact that partisan offices were at issue. The concern in both fora was with the State's abridgement of the rights of political parties and their members to exchange ideas and information, not with the nature of the elections at issue. *See, e.g.*, 109 S.Ct. at 1020 ("[a]'highly paternalistic approach' limiting what people may hear is generally suspect, but it is particularly egregious where the State censors the political speech a political party shares with its members") (citations omitted); 826 F.2d at 835 (same).

Even if we were to find the state interests underlying § 6(b) compelling, we still would be bound to declare the amendment invalid, because appellants have failed to show that § 6(b) is narrowly tailored to achieve its purported objectives. *See Eu*, 826

F.2d at 834 (citing *Consolidated Edison Co. v. Public Serv. Comm.*, 477 U.S. 530, 100 S.Ct. 2326, 2334, 65 L.Ed.2d 319 (1980)). The State claims that § 6(b) is narrowly drawn because only political parties and their county central committees are prohibited from endorsing, supporting, or opposing nonpartisan candidates; individuals are not subject to its restrictions. But as we have noted, *supra* at 283, political parties as well as party adherents possess rights of expression and association under the first amendment, and the mere fact that § 6(b) targets the collective rather than the individual voices of party members does not suffice to render it "precisely drawn." *See Bellotti*, 435 U.S. at 777, 98 S.Ct. at 1416 ("[t]he inherent worth of [political] speech . . . does not depend upon the indentity of its source, whether corporation, association, union, or individual").

Even in the campaign contribution and expenditure cases appellants cite as support for their position, the Supreme Court consistently has emphasized the limited nature of the restrictions it has upheld and the availability of alternative avenues of expression for the affected speakers.[3] As the Court observed in *Buckley*, with regard to the narrow provisions of the FECA it found to be constitutional:

> [s]ignificantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and *political parties*.

---

[3] In *Austin*, for example, the Court found the Michigan enactment at issue to be "precisely targeted" to achieve its aims because it "does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds." 110 S.Ct. at 1398 (emphasis in original). Similarly in *MCFL*, the Court emphasized that the FECA limitations on corporate political expenditures upheld in its previous cases were "of course distinguishable from the *complete* foreclosure of any opportunity for political speech that we invalidated in the state referendum context in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 [98 S.Ct. 1407 55 L.Ed.2d 707] (1978)." 479 U.S. at 259 n. 12, 107 S.Ct. at 628 n. 12 (emphasis added).

424 U.S. at 28-29, 96 S.Ct. at 639-40 (emphasis added). Obviously, the same cannot be said of § 6(b); it imposes a total ban on any partisan gesture of support for or opposition to a candidate. Accordingly, the district court below specifically found that the State could adequately safeguard the interests § 6(b) was designed to protect by less drastic means, including provision for non-partisan methods of nominating candidates for local and judicial offices and controls on partisan activities of the candidates.[4]

We therefore reject appellants' assertion that allowing party endorsements will lead inexorably to party usurpation of the nomination process for nonpartisan candidates; the seventy years of nonpartisan government celebrated by appellants were achieved without benefit of a formal ban on partisan advocacy, and the State has offered nothing but speculative evidence to

[4] In fact, the California Elections Code features several provisions designed to preserve the non-partisan character of local and judicial elections. To begin with, we note that Section 37 of the Code explicitly forbids party participation in the nomination of candidates for nonpartisan office, defining a "nonpartisan office" as "an office for which no party may nominate a candidate." In addition, the Code contains provisions stating that declarations of candidacy and other nomination papers may not refer to party affiliation (§ 6401.5); the name of the party to which a candidate for nonpartisan office belongs may not appear on the ballot (§ 10200.5); a voter may cast his ballot for a candidate for nonpartisan office without regard to party affiliation (§ 10214); and partisan and nonpartisan offices are to be listed in separate columns on the ballot form (§ 10207). *See Unger,* 37 Cal.3d at 616 (Grodin, J., concurring). *See also* Note, *Local Nonpartisan Elections, Political Parties and the First Amendment,* 87 Colum.L.Rev. 1677, 1698-1700 (1987) (concluding that § 6(b) unconstitutionally burdens first amendment rights and discussing means short of a complete ban on political party involvement in nonpartisan elections states may employ to counteract perceived threats of undue party influence on nonpartisan officeholders and preserve responsiveness of local government to constituent concerns).

§ 6(b) was enacted in 1986; appellants have made no showing that the above-mentioned Election Code provisions have proven inadequate to maintain the nonpartisan character of local and judicial offices.

support its contention that the invalidation of § 6(b) will generate a disastrous departure from the experience of the past.[5]

We are not unmindful that "the Constitution grants to the States a broad power [to regulate Congressional elections under] Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217, 107 S.Ct. 544, 550, 93 L.Ed.2d 514 (1986); *see also Oregon v. Mitchell,* 400 U.S. 112, 124-25, 91 S.Ct. 260, 264-65, 27 L.Ed.2d 272 (1970) (opinion of Black, J., delivering the judgment of the Court) (observing that under the 10th Amendment, one of the powers reserved to the states is the regulation of state elections). But as the Supreme Court has emphasized, the state's power to protect the integrity of its electoral processes "does not justify, without more, the abridgement of fundamental rights, such as the right to vote, see *Wesberry v. Sanders,* 376 U.S. 1, 6-7, 84 S.Ct. 526, 529, 11 L.Ed.2d 481 (1964), or, as here, the freedom of political association." *Tashjian,* 479 U.S. at 217, 107 S.Ct. at 550; *see also Miami Herald v. Tornillo,* 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730

[5] The affidavits by various state officials offered in evidence by appellants fail to demonstrate that "the relative voice of [political parties] has been overwhelming or even significant in influencing" nonpartisan elections, "or that there has been any threat to the confidence of the citizenry" in its nonpartisan officeholders. *See Bellotti,* 435 U.S. at 789-90, 98 S.Ct. at 1422-23. Indeed, as Justice Grodin pointed out in *Unger,* "one might expect that in local elections . . . , local 'special interest' and civic groups would have a greater influence over the electorate than would political parties." 37 Cal.3d at 623-24 n. 4, 209 Cal.Rptr. 474, 692 P.2d 238 (Grodin, J., concurring) (citing Lee, *The Politics of Nonpartisanship* 77, 79 (1960)).

Even if California is correct, and the availability of partisan endorsements *in the future* does produce nonpartisan officeholders more sensitized to party preferences, that result will have been effected through the exercise of informed voter choice—a mechanism with which the State may not interfere out of a concern that, in the absence of regulation, the voters will misperceive their own best interests. *See Bellotti,* 435 U.S. at 791 n. 31, 98 S.Ct. at 1424 n. 31 ("[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves").

(1974) and *Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966) (striking down on first amendment grounds state election laws interfering with newspapers' rights to comment on political candidates); *Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (10th Amendment cannot save legislation prohibited by subsequently enacted fourteenth amendment).[6]

Because we find that the ban on partisan endorsements by political parties burdens political speech without being narrowly tailored to serve compelling state interests, we hold that § 6(b) violates the first and fourteenth amendments.[7]

AFFIRMED.

REINHARDT, Circuit Judge, with whom KOZINSKI, Circuit Judge, joins, concurring:

I join fully in Chief Judge Goodwin's opinion for the court. However, in an effort to ensure that no one will be misled by the ostensible teachings of history, I submit this separate concurrence responding to Judge Alarcon's thesis that today's political parties pose a fundamental threat to democratic institutions in California and that their endorsements bring with them the taint of corruption. I also write to comment on the concerns raised in his opinion regarding the independence of California's judiciary.

I

There is always a danger in too facile an application of the principle that important lessons may be learned from past events. The problem is similar to the one we frequently experience with those who claim to be expert in determining the original intent of

---

[6] It is, of course, "irrelevant that the voters rather than a legislative body enacted [§ 6(b)], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295, 102 S.Ct. 434, 437, 70 L.Ed.2d 492 (1981).

[7] This disposition makes it unnecessary to reach appellees' equal protection claims.

our founding fathers. In both cases, it is the level of generality that is critical, and that so badly confounds the pseudo-experts. In short, "students" sometimes learn the wrong lesson from history —they discern the wrong message not by getting the historical facts wrong but by concentrating on superficial statements or inferences rather than on the fundamental principles that underlie them. For example, it is certainly true, as a matter of historical fact, that the American colonists found it necessary to be vigilant against roving bands of Indians. However, for a modern student of our early history to draw from that fact the lesson that we must today be constantly on the alert against "predatory" Native Americans would be rather foolish. On the other hand, to learn, as a result of our early experience, a more fundamental lesson—namely, that individuals may find it necessary to band together in their common defense—might show a modicum of wisdom.

In the case at hand, it does not take much wisdom to know that, whatever the cause of the problems in municipal government in the early 1900s, today's threat to the integrity of the political process comes not from the Republican or Democratic parties—or even from the Libertarians—but rather from the corrupting influence of money in politics—that is, from massive political contributions. All recent California governors have, of course, been nominated by political parties, while California mayors have, since the days noted by Judge Alarcon, been elected in nonpartisan races. Yet there is no reason to think that recent governors, like Pat Brown, Ronald Reagan, Jerry Brown, and George Deukmejian, have been more subject to corruption, in any form, than mayors, like Pete Wilson, Dianne Feinstein, Tom Bradley, Sam Yorty, and Joe Alioto. In fact, today's problems concerning the lack of integrity in government may well stem in substantial part from the weakening of the political party system, both locally and nationally. Throughout the nation, candidates no longer can look to the party to assume responsibility for the cost of their campaigns. Conversely, parties no longer can impose discipline on individuals elected to office as the party's standard bearers. These days public officials and would-be public officials must go directly to the big monied interests and beg for the funds necessary to finance their campaigns. In modern-day America, there simply is no reason to associate partisanship with corruption.

There is a basic fallacy in Hiram Johnson's notions of reform. Eliminating the middle-man does not do much to solve the fundamental problem of corruption. In fact, in this case it may have exacerbated it. We are told that in the early 1900s the Southern Pacific Railroad was the villain, that it controlled both the legislature and the political parties. Strangely, while Johnson's reforms deliberately weakened the party structure, they left the Southern Pacific wholly untouched, free to contribute, free to endorse, free to promote its own candidates regardless of their ideology. Accordingly, the reforms not only compelled candidates to deal directly with the Southern Pacific and its lobbyists, but made them more dependent on the railroad's contributions.[1] Political reforms are always well intended. Frequently, however, they, like ill-thought-through history lessons, address only the superficial evil and fail to consider the underlying problem.

That is not to say that the people of California do not have the right to use a system of nonpartisan elections for filling local and judicial offices. No one quarrels with that right. But the people of California may not suppress free speech on the excuse that they are merely determining the method by which candidates will be elected. For nearly eighty years, California's local and judicial elections have been "nonpartisan." Traditionally, and as California has applied the term, a nonpartisan election means that the candidates who appear on the general-election ballot are not selected by political parties. Cal.Elec.Code § 37. Anyone can run in the primary, not just persons registered in a particular political party. *E.g.* Cal.Elec.Code §§ 22836 & 25301. If any one of the primary candidates in a nonpartisan election receives a majority of the votes, he is elected; otherwise, the two individuals who receive the highest number of votes face each other in the general election. Cal.Elec.Code §§ 6611, 6612, & 7202. In any event, all

[1] Of course, as Judge Canby pointed out in his excellent dissent from the original panel opinion, it would not "have been constitutional for California to solve the problem of Southern Pacific dominance by prohibiting the Railway from announcing its support for particular political candidates." 880 F.2d 1062, 1084 (1989).

citizens, regardless of party affiliation, are eligible to participate in all stages of the nonpartisan election process.[2]

California may continue to hold elections that are nonpartisan in the traditional sense. But there is all the difference in the world between refusing to delegate to political parties the decision as to which candidates appear on the general-election ballot and prohibiting political party organizations from announcing their views on the merits of candidates seeking public office. The latter directly infringes on the right of free speech. As the Supreme Court has stated, "[T]he first amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989). Prohibitions on endorsements "directly hamper[ ] the ability of a party to spread its message and hamstring[ ] voters seeking to inform themselves about the candidates and the campaign issues." 109 S.Ct. at 1020. "[I]t is particularly egregious where the State censors the political speech a political party shares with its members." 109 S.Ct. at 1020.

The issue, in short, is not a matter of how to define or structure a "nonpartisan election." It is instead a question of the right of individuals to band together and express their collective views on a matter of public concern.[3] Unless the state can demonstrate a compelling need to do so, it cannot limit such speech. That the

[2] In an election for partisan office, each party chooses its own nominee in a primary election in which all party members are entitled to vote. Cal.Elec.Code § 6610. The candidates whose names are printed on the primary ballot must all be members of the party. Cal.Elec.Code §§ 6401-6402. The party's nominee then contends for office in November against the nominees of the other political parties. It is possible under California law, for an independent to qualify for the general election ballot as well, Cal.Elec.Code § 6800, although with one exception, a state senator from San Francisco, this provision has been of little significance in recent decades.

[3] It would be difficult to surpass the analysis of the free speech issue set forth in Judge Canby's dissent, 880 F.2d at 1082-86. I commend that dissent to anyone interested in the general topic.

speech is collective rather than individual is of no import. The state may no more prevent Republicans in Los Angeles County from announcing their collective position on candidates for nonpartisan office than it could prevent an individual Republican party member from running for a nonpartisan office, or from proclaiming during the campaign that he is a member of the Grand Old Party and that he intends, if elected, to follow its tenets unservingly. Similarly, of course, the state could not prevent members of political parties from voting in an election to select a nonpartisan office-holder. While the state may have a compelling interest in maintaining its nonpartisan election structure for certain offices, there are obvious limits to what it may concern itself with. It may select the form of local government it wishes and prescribe procedures for its implementation; however, it has no compelling interest in limiting the people's right to make informed choices or to select candidates for office on whatever basis they deem relevent.

The dissent's description of California's populist reforms should not inadvertently mislead anyone into believing that Hiram Johnson and his reformers long ago enacted a prohibition against endorsements in nonpartisan elections. The reformers were not that out of touch with our Constitution. To the contrary, political parties were free to make endorsements in nonpartisan races in the period following the Johnson reforms, right up until 1986. Only then did the voters adopt the no-endorsement rule that Judge Alarcon now finds so essential to the preservation of the republic. Until the adoption of the initiative measure in 1986, political parties were free to, and did, endorse in numerous nonpartisan elections. As Justice Mosk wrote in *Unger v. Superior Court*, in California it was "*customary* for the governing bodies of political parties to endorse or assist candidates in elections for nonpartisan office."[4] And prior to 1986, few thought that the

[4] 37 Cal.3d 612, 616, 209 Cal.Rptr. 474, 477, 692 P.2d 238, 241 (1984) (emphasis added). Dissenting in *Unger*, Justice Sims, sitting by designation, discounted the frequency of such partisan activity by stating that it occurred in only 25 percent of the state's counties. His use of statistics, however, was highly misleading. In the study on which Justice Sims relied, Professor Lee noted that the tendency of political parties to participate in nonpartisan elections increased with the population. According to Professor Lee's study, if the counties without significant populations are excluded, the political parties made endorsements in nonpartisan elections in roughly two-thirds of the state's counties. E. Lee, *The Politics of Nonpartisanship* 102-03 (1906).

political process was in any great danger as a result. Thus, historical events of the early 1900s cannot provide the basis for limiting the free speech rights of today's California Democrats, Republicans, and minor party members. Nor can the limitation of that speech be deemed necessary to the proper functioning of the nonpartisan election system. In reaching those conclusions, I note that nowhere in the record is there a whit of evidence that party endorsements in nonpartisan elections ever, even on a single occasion, led to corruption or evil of any kind—almost eighty years of endorsements in nonpartisan races and not one example of a public official being unduly or improperly influenced.[5]

In fact, recent experience tends to suggest that the influence of party organizations is not nearly as great as Judge Alarcon fears. Only a few months ago the California Democratic party made endorsements in the statewide partisan primary for the first time. The endorsed candidates for Governor and Insurance Commissioner, the only two seriously contested statewide posts for which endorsements were made, both lost by substantial margins. In nonpartisan races, the voice of political party organizations is likely to be even less effective. Ordinarily endorsements in those races are made on a local level; there, the endorsing bodies are the county central committees, which are notoriously uninfluential organizations. In any event, in nonpartisan races, as in partisan ones, the party's voice is but one of many that seek, whether for selfish or idealistic reasons, to persuade voters to case their ballots

[5] Former court of appeal justice Winslow Christian's testimony simply presents one experienced individual's policy views on the subject of partisan endorsements in judicial elections. Certainly, those views can no more carry the day for an unconstitutional measure than can the popular vote. In any event, Mr. Christian's statement, like the rest of appellant's case, fails to offer a single fact, pro or con, relating to the making of a partisan endorsement, or its subsequent effect, in a nonpartisan race in California.

one way or the other. The only difference is that in nonpartisan races the party's voice is even more attenuated since its message is directed not only at its own members but at the electorate at large.

As I have already noted, political parties have the same rights as others to make their views known; their speech may not be suppressed unless the state can demonstrate that it is necessary to do so for compelling reasons. *Eu*, 109 S.Ct. at 1019-20. It is also important to note that the result would be no different here even if political parties' endorsements carried great weight and influenced voters inordinately. For speech cannot be prohibited on the ground that it is effective.[6] In any event, in this case those arguing that a compelling governmental interest warrants limiting the right of members of political parties to make known their collective views have completely failed to carry their burden.

II

A

Judge Alarcon's dissent touches on a critical and sensitive subject when it discusses the question of the independence of the California state judiciary—and the threat to that independence that purportedly arises when political parties are free to express their views regarding the qualifications or records of candidates for judicial office. My colleague's argument is paradoxical indeed, and, implicitly but unavoidably, raises the basic question whether judges who are forced to stand for election *can* be independent. The threat to the independence of elected judges stems from the fact that they are dependent for their livelihood and continued employment on the political process. They must all stand for election at one time or another, either initially, shortly after their

[6] Judge Canby has pointed out most articulately that the state's theory that it can prohibit endorsements because voters will be unduly influenced by them constitutes a classic form of state paternalism, and reflects an unwillingness to allow voters to receive information on which, the state believes, they would like to base their decisions. 880 F.2d at 1083.

appointment, or at the end of their first and subsequent terms. Cal. Const. art. VI § 16. Some raise large sums of money and seek support from persons and pressure groups with particular interests that will come before them. Judicial candidates are rated by various interest groups and are questioned about their decisions —sometimes about the very issues listed in Judge Alarcon's dissent. None of this appears to cause my dissenting colleague any concern—except for the fact that *one* of the groups that may endorse a judicial candidate may be a political party organization.

The paradox I find in Judge Alarcon's position lies in the assumption that judges can remain independent though compelled to seek financial contributions and other assistance, including endorsements, from powerful special interests and pressure groups, but that their very integrity may crumble if they ask members of a political party publicly to proclaim their collective support. As far as I am concerned, one can make a plausible argument that judges who must run for election cannot be fully independent—that their decisions on controversial issues will be suspect—that they are too susceptible to pressures arising out of personal concerns.[7] Or, on the other hand, one can argue that good judges, being strong-willed, intellectually disciplined, and highly principled, will disregard the effects of being compelled to seek, and accept, the aid of those whose basic interests are regularly at stake in their courts. But it cannot be seriously argued, in my view, *both* that the typical judge is strong enough to ignore the temptation to succumb to the influence of those who

[7] Retired California Supreme Court Justice Otto Kaus, for example, has publicly questioned whether his decisive vote to uphold California's Victim's Bill of Rights in 1982 might have been influenced by the fact that he was facing a retention election that year. Wold & Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 Judicature 348, 351 (1987). Former Justice Grodin, during his retention campaign, made it his "goal to go to bed election night knowing, as best one can know such things, that I did not decide any case differently because of the election. To the best of my knowledge I achieved that goal. But I have to recognize that I may be wrong." Grodin, *Judicial Elections: The California Experience*, 70 Judicature 365, 367 (1987).

can truly control his destiny—the powerful interests, the big contributors, even the governor who has it solely within his power to make a career advancement possible[8]—*and*, at the same time, that the typical judge is so weak, morally or ethically, that he will not be willing to disagree in subsequent judicial opinions with so much as a single plank of the platform of a political party that has given him nothing more than its endorsement. That argument simply does not make sense.

B

We can, of course, learn from history, and the events surrounding recent judicial elections in California shed significant light on the

---

[8] Governors are free to take positions in judicial elections, and at least some do. Governor George Deukmejian served as a vigorous public spokesman for the forces seeking to oust the incumbent Supreme Court justices in the 1986 election. When his view prevailed, he was able to appoint successors whose positions on controversial issues more closely matched his own.

Since our concern here is not with the electoral debate *per se*, but rather with the effect on the post-election performance of public duties, it is interesting to note that some of Governor Deukmejian's remarks in the 1986 campaign were explicitly directed toward the "correction" of what the Governor perceived as errant judicial conduct by sitting justices. Governor Deukmejian initially opposed only Chief Justice Rose Bird, and not Associate Justices Cruz Reynoso and Joseph Grodin. Toward the middle of the campaign, however, as former Justice Grodin tells us, the Governor

> declared that he would be inclined also to vote against Justice Reynoso and myself if our records in death penalty cases did not improve. Still later, in the early fall preceding the election, he announced that he did, indeed, intend to vote against the two of us as well, citing as justification that Justice Reynoso had voted only once to affirm a death penalty judgment and on only five occasions had I done so. There was no analysis of the cases, no argument that the grounds on which we had voted to reverse death penalty judgments were legally insubstantial, and no indication of how many death penalty judgments we would have to affirm to meet with Governor Deukmejian's approval.

Grodin, *supra* note 7, at 367.

problem we are asked to resolve. In the 1986 statewide general election, three members of the California Supreme Court, including the Chief Justice, were voted out of office because a majority of the electorate disagreed with the perceived views of those justices on controversial issues. The election was not one in which either major political party made an official endorsement. However, endorsements there were—and campaign contributions for and against the justices totalling more than eleven million dollars. A wide variety of special interest groups—insurance companies, oil and gas interests, large corporate employers, agricultural conglomerates, prosecutors, and other law enforcement officials—poured money into the campaign coffers of the organizations formed to defeat justices who wrote or joined in opinions those groups deemed harmful to their economic or professional interests. On the other side, personal-injury and criminal defense lawyers who agreed in general with the Court's decisions rallied to the support of the beleaguered judicial officers.

In the months preceding this nonpartisan election, the three embattled justices were forced to appear on television to plead their cases, and to seek the endorsements of powerful newspapers, bar organizations, and prominent lawyers. Most important, however, the justices were compelled to seek large amounts of money from potential campaign contributors so that they could convey their messages to the voters. True, they could have kept silent—but if the people of the state want elections for judges, they must also want a fair and full debate on the issues; and a fair and full statewide debate these days costs many millions—at least if, as was the fact in the 1986 California election, the opponents of incumbent judges conduct a full-scale, paid media campaign with thirty-second spots designed to inflame the passions and prejudices of the voters. Statistics from other states suggest that California's experience in the 1986 race was not unique. Seven million dollars was spent in Ohio's nonpartisan elections for the state Supreme Court that same year. Even back in 1980, three open seats on the Texas Supreme Court generated campaign expenses of nearly two million dollars. Uelman, *California Judicial Retention Elections*, 28 Santa Clara L.Rev. 333, 348 n. 44 (1988).

Money is no less important in the case of California's trial-court judges; a survey conducted by the California Judges' Association is informative in this connection. One judge who responded to the survey wrote, "[M]y 'reasons for winning' . . . are as follows: (1) *Money;* (2) Organization; (3) An early start; (4) *Money;* (5) An 'excellent' candidate; (6) A weak opponent; (7) Excellent public relations and use of media advice; (8) *Money;* (9) Luck." Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?* 2 J.L. & Pol. 57, 155 (1985) (emphasis in original). This dependence on contributors may actually affect a trial-court judge more significantly than an appellate judge, since a large portion of the necessary money is contributed by lawyers who may then or later (or indeed, regularly) have cases pending in the candidate's court.[9]

C

In light of the above, the California provision prohibiting endorsements by political parties appears to be a particularly peculiar way of addressing the problem of maintaining judicial independence. Obviously, the dependence of judges on campaign contributions represents a far greater threat to the integrity of California's judiciary than does the possibility that some judicial candidates may be endorsed by political party organizations. Yet

---

[9] It is only natural, of course, for members of the bar to join the fray on both sides, for no one is more interested than lawyers in the question of who will decide controversial cases. Indeed, lawyers constitute the largest single group of contributors to judicial campaigns generally. The excessive judicial reliance on attorney contributions can raise troubling questions about the even-handedness of justice. *See generally* Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum*, 86 Mich.L.Rev. 382 (1987). At least as disturbing is the role played by law enforcement organizations. Statistics from 1980 show that such organizations are at the top of the list in terms of average contributions. Dubois, *Financing Trial Court Elections: Who Contributes to California Judicial Campaigns?* 70 Judicature 8, 12-13 (1986). Defense counsel may well wonder whether their clients will receive a fair shake from the recipients of that largesse.

the state has not regulated the solicitation of campaign funds by incumbent or would-be judges, even though, as Chief Judge Goodwin points out in the majority opinion, the financial influences condoned by the state of California are not entitled to as much protection under the Constitution as the core political expression the state seeks to suppress. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 257-59, 107 S.Ct. 616, 627-29, 93 L.Ed.2d 539 (1986); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497, 105 S.Ct. 1459, 1468, 84 L.Ed.2d 455 (1985). If contributions and endorsements are to be treated differently under the first amendment, one would expect the state to afford greater, not lesser, constitutional protection to the latter.

In actuality, the prohibition of endorsements appears to be counterproductive, for it *increases* the dependence of judicial candidates on campaign contributions. Endorsements permit the judge to get his name before the public in a favorable light at no expense to himself. Shutting off that avenue may well require him to find other means of attempting to make his name a household word in a few short months. Almost all those other means will involve the expenditure of substantial amounts of money. For example, a judge may file a candidate's statement which will be mailed to the voters by the county along with other election material, such as the statewide and local ballot arguments. The rub is that the judge must pay the cost of the mailing, Cal.Elec.Code § 10012, a cost well beyond the means of most judicial officers. In the most recent election in Los Angeles County, the cost—to a candidate for the position of Superior Court judge—of distributing a biographical statement to the voters was over $62,000, and that cost was approximately fifteen percent higher than the cost at the time of the previous election only two years earlier. Campaign costs for *all* means of communication have escalated comparably—and rapidly—and the need for judges and would-be judges to engage in serious fund raising activities continues to grow each year.

Moreover, even if it were constitutionally permissible to ban some forms of speech in judicial campaigns, there is no warrant for singling out political endorsements. In part, this is because the

political parties have as much right to make known their views regarding candidates for judicial office as do the Crime Victims for Court Reform, the Law and Order Campaign Committee, the District Attorneys' Association of California, the National Organization for Women, or the *San Francisco Chronicle,* all of which took official positions in California's 1986 retention election. The fact is that suppressing the views of political parties leaves the field free to special interest groups that have narrow, often single-issue agendas they wish to advance through the courts. California's endorsement ban permits those groups to promote their chosen candidates without fear of countervailing messages from broader-based political parties which tend to take a more balanced view, and which consider candidates' overall records, qualifications, and judicial philosophy. And California's choice must seem particularly irrational to anyone familiar with the regrettable propensity of those who manage judicial campaigns to pander to the voters' lack of familiarity with the processes of the law, and particularly the criminal law. Again California's experience in 1986 provides a telling example:

> [I]magine the power of the 30-second television spot: here was a stomach-turning crime, committed by a person whose humanity was cloaked in blood; here is the mother, or the grandmother, or the daughter of the victim lamenting her loss, and suggesting, or implying, that the California Supreme Court, in its unalterable opposition to the death penalty, and in defiance of the public will, had in reliance upon some unidentified technicality set the defendant loose on the streets. Of course, it was no technicality, but a matter of constitutional or statutory right, and of course the defendant was not turned loose, but returned for retrial—in fact by the time the opposition ran the principal ad I have described, the defendant in the case had already been retried, reconvicted, and sentenced to death. But try explaining all of that effectively in 30 seconds on television, or in any manner sufficient to offset the emotional impact of the opponents' appeal.

Grodin, *supra* note 7, at 366-67. See also Forum, *The Robed Politician,* L.A. Law., Mar. 1979, at 12. Given that many of the arguments befouling today's judicial campaigns are harmful to

the health of the state judiciary, there is little reason to single out political endorsements, which are surely a cut above much that currently passes for "debate on public issues [that is] uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964).

Finally, anyone familiar with California's judicial elections must be aware that prohibiting official party endorsements cures none of the ills cited by supporters of the ban. First, to the extent that one is concerned about the use of "litmus tests" for judicial candidates, the concern is misdirected. As I have already suggested, party organizations are far less likely to use "single-issue" determinants of judicial fitness than are many powerful interest groups that participate in election campaigns, such as the National Rifle Association, the National Abortion Rights Action League, or the Right to Life Committee. Silencing the voice of political parties serves only to increase the strength of the message being delivered by other groups with narrower or less public-spirited objectives. Under these circumstances, it could well be argued that Judge Alarcon's "frightened incumbent who has been subjected to media criticism for an unpopular decision," *post,* at 313, should welcome the broader perspective the political parties offer and the support their endorsements can bring.

Second, if the concern is rather that endorsements will be made on the basis of political allegiances that have nothing to do with judicial fitness, that is not an appropriate consideration on which to base a measure outlawing speech. Voters are free to accept or reject endorsements made on the basis of political beliefs, just as they are free to base their ultimate choice on their own view of the judicial candidate's political or judicial philosophy. Moreover, it is obvious that the "slate mailers" that frequently substitute for authentic endorsements have even less relation to the character or ability of the candidate. Today's judicial elections, for the trial courts at least, are marked by the widespread use of pseudo-official mailers that contain endorsements of candidates for both partisan and nonpartisan office. Republican candidates for partisan office are listed on slates addressed to Republican voters; Democratic slates contain the name of Democratic candidates and are mailed to Democratic party members. In each case, the

names of the "endorsed" judicial candidates are listed as well. However, the decision as to which candidates will appear on the slate mailers is made not in a democratic manner by the members or officers of an official party organization; instead, it is made by private entrepreneurs, some of whom sell space—that is, endorsements—to the highest bidder.[10] Many of these private slate mailers, despite small print disclaimers, use the name of a political party and appear to the average voter to contain official party endorsements. If political parties were to be prohibited from making endorsements in judicial campaigns, then judicial candidates who might otherwise seek an honest endorsement from a legitimate political party might be compelled to buy spurious party endorsements—to pay thousands of dollars to be included on slate mailers sent out by private operators who may have no convictions about anything.[11] Thus, even if party endorsements are made in substantial part on the basis of political affiliations, those affiliations are likely to tell the voters more about a candidate's judicial philosophy than would the fact that he can afford to purchase a spot on one or more pseudo-official slates.

---

[10] In a primary election, both the partisan and the nonpartisan slots on slate are wide open. For some offices, the slate-mailer operator may choose candidates affiliated with his faction of the party; in other cases, the highest bidder may prevail. In the general election, the factors are different. The party's nominees for partisan office are included automatically and only endorsements of judges and other nonpartisan candidates, as well as endorsements of ballot measures are up for grabs. It is in fact the supporters or opponents of the latter who principally finance slate mailers. The official party organizations may also on occasion mail official slate mailers, but these mailers are only sporadic and generally are not distributed nearly as widely.

[11] Judge Alarcon's "frightened incumbent" may well not be willing to risk letting his opponent outbid him and secure the highly desirable spot on the pseudo-official slate mailer. Slate mailers are among the least expensive ways for an incumbent judge to let the voters know something about himself, not an easy task for an individual of whom the public is likely to have no prior awareness.

III

The State of California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate. It cannot forbid speech by persons or groups who wish to make their views, support, or endorsements known. Nor can it complain if the citizens wish to make their electoral judgments based in part on recommendations made by political parties. If the people are to be given the right to choose their judges directly, they are free, rightly or wrongly, to consider the political philosophy of the candidates.[12] They are even free, rightly or wrongly, to consider how the candidates may vote on important issues of public concern, such as abortion, capital punishment, affirmative action, gun control, and religious freedom, to name just a few. One would have to be exceedingly naive not to be aware that a judge's judicial philosophy may influence his or her votes on important public issues that come before the court, particularly the state or federal supreme court. Whether a judicial candidate wishes to make his views known on those issues during the electoral process is another matter. So is the question whether it is proper for him to do so. But those are all problems inherent in California's decision to conduct judicial elections. If California wishes to elect its judges, it must allow free speech to prevail in the election process. While it is undoubtedly clear to all that California could not prohibit *all* endorsements in judicial elections, in this case it is equally clear that it cannot single out one form of disfavored speech and ban it.

Of course, the citizens of California have a choice. If they want their judges to be free from the need to conduct full-scale political campaigns, to solicit campaign funds, to seek endorsements from political organizations and private-interest pressure groups, and, most important of all, to be free from the need to worry about whether their decisions in pending cases will affect their chances

---

[12] That is clearly a factor normally considered by the appointing authority. More than ninety percent of all judges appointed by Democratic and Republic presidents in recent years were members of the same party as their benefactor. The same is generally true with appointments to the state courts by California governors.

of reelection, there are options available. California could, like the federal government, provide for the appointment of judges for life —at some or all levels of its judiciary. Or, there are other alternatives, some more in keeping with the traditional approach of most states. For example, California could provide that its judges must be elected or confirmed once, and that thereafter they would not need to stand for office again. However, it is not my function to tell California what system it should use to select its judges. There are legitimate arguments both for and against judicial elections; and various factors to be balanced—the most important being accountability, on the one hand, versus independence, on the other. In the end, however, any system must be judged in large measure by the quality of the judges it produces.

The system presently used in California has both advantages and disadvantages, as does the federal system. However, one thing is clear: Whatever California's ultimate decision, it may not call an election, judicial or nonjudicial, and silence citizens who wish to speak, individually or collectively, through a political party organization or otherwise.

RYMER, Circuit Judge, with whom ALARCON and FERNANDEZ, Circuit Judges, join, dissenting:

There is no question that political speech is at the core of the First Amendment, and is to be jealously protected. *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989); *Buckley v. Valeo*, 424 U.S. 1, 14-15, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976). "Debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Id.* at 1, 96 S.Ct. at 612. Similarly, there is no question that all persons have the right to associate in political parties for the purpose of espousing their views. *Tashjian v. Republican Party*, 479 U.S. 208, 214, 107 S.Ct. 544, 548-49, 93 L.Ed.2d 514 (1986). Likewise the state's power to regulate the time, place and manner of elections does not extinguish the state's responsibility to be faithful to the First Amendment. *Id.* at 217, 107 S.Ct. at 550; *Eu*, 109 S.Ct. at 1019. I also agree that California's ban on political party endorsements, opposition and support of candidates for nonpartisan elections burdens First Amendment rights, and is

subject to strict scrutiny. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978).

However, I disagree that this case is like any other, including *Eu*, upon which the majority relies.[1] Article II, § 6(b) of the California Constitution, which was designed to keep party politics out of elections for these nonpartisan offices, must therefore be analyzed afresh.

The restriction on party endorsements in non-party elections goes to the heart of the structure of local, educational and judicial governance, which California has determined shall be nonpartisan in form. Cal. Const. art. II, § 6(a); Cal.Elec.Code § 37. No one contests the constitutionality of this structure. Implementing it, the Legislature has enacted a number of statutes that insulate nonpartisan elections from the party apparatus.[2] When the Cali-

---

[1] *Eu* had to do with whether the state could interfere with the internal processes of a party by preventing its governing body from endorsing, supporting or opposing a candidate for nomination to partisan offices in the party primary. It has nothing to do with the issue in this case, which concerns the nonpartisan structure of the judicial, municipal and educational units of government and the role of a partisan political party in nonpartisan elections for nonpartisan offices.

As Judge Norris wrote for our court in *Eu*, "[i]t is the right of the party, not the State, to decide how the party shall be governed." 826 F.2d 814, 827 (9th Cir.1987). The Supreme Court recognized the same point: "[a] primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them." 109 S.Ct. at 1022. Based on this principle it followed that the state may not enact laws " 'to prevent the parties from taking *internal* steps affecting their own process for the selection of candidates.' " *Id.* (quoting *Tashjian*, 479 U.S. at 224, 107 S.Ct. at 553-54) (emphasis added).

[2] For example, Cal.Elec.Code § 6401.5 provides that declarations of candidacy and other nomination papers for nonpartisan office may not refer to party affiliation; the name of the party to which a nonpartisan candidate belongs may not appear on the ballot (§ 10200.5); a voter may cast a ballot for a candidate for such an office without regard to party affiliation (§ 10214); and partisan and nonpartisan offices are listed in separate columns of the ballot (§ 10214). Political parties are also prohibited from nominating a candidate for a nonpartisan office (§ 36).

fornia Supreme Court ruled in 1984 that existing law did not clearly prevent political parties from endorsing and supporting candidates for nonpartisan office,[3] the people adopted a constitutional amendment to make clear their intent that no political party or party central committee should endorse, support or oppose a candidate for nonpartisan office.

The question in this case is whether California has a compelling interest in the structure of its nonpartisan government, such that prohibiting political party endorsements, opposition and support of candidates for nonpartisan office is the least restrictive means by which it can be achieved.[4] The answer, I submit, requires us to consider the unique nature of this interest in our federal system, and to constrain ourselves in the interests of comity to interpret § 6(b) so as to avoid unconstitutionality, if possible.

California's interest in this case is of extraordinary importance. It is rooted in the United States Constitution, which assures the citizens of each state the right to determine the structure of their

---

These provisions have the effect of creating a two-track process of candidate selection and election, paralleling the structural difference between nonpartisan and partisan offices.

For a comprehensive and detailed history of these statutes and the nonpartisan structure in California *see Unger v. Superior court,* 37 Cal.3d 612, 209 Cal.Rptr. 474, 692 P.2d 238 (1984), and the original panel opinion by Judge Trott in *Geary v. Renne,* 880 F.2d 1062 (9th Cir. 1989).

[3] *Unger,* 37 Cal.3d 612, 209 Cal.Rptr. 474, 692 P.2d 238.

[4] Although freedom to discuss matters of public concern is fundamental to our national heritage and the system of government ordained by our Constitution, the protection is not absolute and restraints are permitted for appropriate reasons. *See, e.g., Austin v. Michigan Chamber of Commerce,* ___ U.S. ___, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) (expenditure limitation); *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (contribution ceilings); *Storer v. Brown,* 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) (orderly elections); *Munro v. Socialist Workers Party,* 479 U.S. 189, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986); *Jenness v. Fortson, 403* U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d (1971) (ballot access).

own government so long as it is in a republican form.[5] Because of its constitutional underpinning, the state's interest in this case is particularly compelling. Such an interest requires a different balancing of the burdens on plaintiffs' First and Fourteenth Amendment rights, the state's justification for the burdens imposed, and the restrictiveness of the means available to accomplish the goal of preserving the nonpartisan structure of government by keeping nonpartisan offices and nonpartisan elections, nonpartisan, than either the district court or the majority has undertaken.

It is not surprising that the state's interest in the structure of its government has not been taken into account, because the City argued a different interest (avoiding corruption) in its papers. Based on the argument that was made, the district court granted summary judgment. On one view this was consistent with *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), because the City produced no evidence to show that the state's interest are endangered by party participation in nonpartisan elections or that § 6(b) is the least restrictive means for serving its interests.[6] However, in light of the significance of this issue to the people of the State of California, and the overriding importance of the interest at stake, it is appropriate that the parties, and the court, have the benefit of a more searching analysis than has occurred in this case.

When, as here, both the record and the issues are inadequately developed, it is within the province of the district court to decline

---

[5] U.S. Const. art. IV, § 4.

[6] The government bears the burden of showing a subordinating interest that is compelling, and of proving that a regulation is a precisely drawn means of serving its interests. *Consolidated Edison Co. v. Public Serv. Comm'n* 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980); *San Francisco County Democratic Cent. Com. v. Eu,* 826 F.2d at 834. At the same time, the district court did not consider the "legislative findings" set forth in the California Ballot Pamphlet for the June 3, 1986 primary election (at which the voters enacted the amendment to Section 6) in determining that there were no triable issues of fact.

a summary judgment.[7] In this very special situation, I would reverse and remand to permit full consideration of the state interest I view as "super"-compelling.[8]

I

A

"A Republic, madam, if we can keep it" was Benjamin Franklin's response when asked what form of government the new Constitution created. A republican government is "a government which derives all its powers directly or indirectly from the great body of the people." The Federalist No. 39, at 112 (J. Madison)(R. Fairfield ed. 1981). It is "constructed on this principle, that the supreme Power resides in the body of the people." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457, 1 L.Ed. 440 (1793) (opinion of Wilson, J.). As put by the Court in *In re Duncan*, 139 U.S. 449, 461, 11 S.Ct. 573, 577, 35 L.Ed. 219 (1891), "the distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws."[9]

---

[7] *In re Ridgen*, 795 F.2d 727, 731-32 (9th Cir. 1986).

[8] The state's interest in the structure of its government is "super" compelling because of its constitutional significance. The guarantee clause commits the United States, including the courts of the United States, to protect the structure chosen by the citizens of each state. In this sense, structure is more compelling than corruption, for example, which is an evil that the state has a "compelling" interest in avoiding but which lacks the constitutional underpinnings of the state's form of government. Having recognized this, the state's interest in this case is to be weighed in accordance with accepted First Amendment jurisprudence.

[9] This power reposing in the citizens of each state is also basic to our federal system. "The federal Constitution forms a happy combination [between a large republic and a small one]; the great and aggregate interests being referred to the national, the local and particular to the State legislatures." The Federalist No. 10, at 22 (J. Madison)(R. Fairfield ed. 1981). *See also, Oregon v. Mitchell*, 400 U.S. 112, 125, 91 S.Ct. 260, 265, 27 L.Ed.2d 272 (1970)(Black, J.)("[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices"); *FERC v. Mississippi*, 456 U.S. 742, 790 n. 28, 102 S.Ct. 2126, 2153 n. 28, 72 L.Ed.2d 532 (1982) (O'Conner, J., concurring in part and dissenting in part)(quoting I. Silone, The School for Dictators 119 (W. Weaver trans.): "[a] regime of freedom should receive its lifeblood from the self-government of local institutions. When democracy, driven by some of its baser tendencies, suppresses such autonomies, it is only devouring itself. . . . [i]f the central government's representative runs the city and the province, . . . you can no longer speak of democracy").

Article IV, § 4 of the United States Constitution declares that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." As described by one commentator, the guarantee clause

> restricts the federal government's power to interfere with the organizational structure and governmental processes chosen by a state's residents. . . . In order to ensure that state and local governments remain responsive to their constituents . . . citizens must have the power to choose the governmental forms that work best for them. The guarantee clause, therefore, grants states control over their internal governmental machinery.

Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 *Colum.L.Rev.* 1, 41 (1988).[10]

California has chosen to make its judicial, educational and municipal offices nonpartisan. The guarantee clause requires that we "respect the state's most fundamental structural choices as to how its people are to participate in their own governance." L. Tribe, *American Constitutional Law* 398 (2d ed.1988). Put another way, the nonpartisan form of government represents a state interest of constitutional dimension. For that reason, it must be accorded weight of the most compelling sort.

---

[10] Merritt makes the further point that "the tenth amendment underscores the need to enforce the federalism principle found in the guarantee clause. The structure of the Constitution, which clearly contemplates a federal system, likewise affirms the importance of interpreting the guarantee clause as a restraint on federal power." *Id.* at 2 n. 8.

B

The district court recognized only a "legitimate" interest in maintaining the nonpartisan character of local, judicial, and school elections. Against that level of interest the court found that § 6(b) was "not a narrowly drafted enactment designed to advance such interest by the least drastic means."[11] Judge Zirpoli postulated that the state could safeguard its interests by providing for nonpartisan methods of nomination (which had already been done by statute), and by controlling partisan activities of the candidates, for example, by prohibiting candidates from soliciting or collecting campaign funds from political parties.

There are two problems with this analysis. It misapprehends the nature of the state's interest, and in so doing, undervalues it. Second, it hypothesizes less restrictive means without considering their relationship to the interest at stake or whether they work.[12]

The interest at stake is California's choice of a nonpartisan structure of government for judicial, school and municipal office. I believe it is "super"-compelling. In determining whether the limitations embodied in § 6(b) sufficiently relate to that interest and are narrowly tailored to serve it, we may look to precedent,[13] determine that the answer is "inherently persuasive" or "self-

[11] *Geary v. Renne,* No. CV-87-4724, at 4 (Order filed April 27, 1987).

[12] "It is not helpful to ponder what is 'less restrictive' without thinking about the functions the rules serve and how these functions would be affected by 'less restrictive alternatives.' *Every* alternative is more restrictive than some other one." *Stevenson v. State Bd. of Elections,* 794 F.2d 1176, 1180 (7th Cir.1986) (Easterbrook, J., concurring) (emphasis in original).

[13] *See, e.g., Buckley,* 424 U.S. at 17-19, 96 S.Ct. at 633-35; *Bellotti,* 435 U.S. at 790, 98 S.Ct. at 1424; *FEC v. National Right to Work Comm.,* 459 U.S. 197, 205-07, 103 S.Ct. 552, 558-59, 74 L.Ed.2d 364 (1982); *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (no precedent on point).

evident,"[14] or base a decision on legislative findings or record evidence.[15]

The majority looks to precedent and finds *Eu v. San Francisco Democratic Cent. Comm.* persuasive. However, it is not possible to fit this case into that pigeonhole. *Eu* involved different issues and a different interest.

Eu had to do with the system by which a political party selects its own candidates for partisan office. The purpose of a primary election within this structure is to settle the differences within the party, so that the majority views of the party members are carried forward to the general election. The partisan primary election is designed to ensure that party nominations are within party lines, thus preserving the integrity of the party. In *Eu* we found that regulation of internal party affairs burdens the right of political parties to govern themselves as they see fit, because a partisan primary is by definition theirs.

By the same token, a nonpartisan election is by definition *not* theirs. The purpose of an election within the nonpartisan structure

[14] *See, e.g., Bellotti,* 435 U.S. at 790, 793, 98 S.Ct. at 1424, 1425.

[15] *Compare Bellotti,* 435 U.S. 765, 98 S.Ct. 1407 (without showing that relative voice of corporation has been overwhelming or even significant in influencing referenda, or that there has been any threat to the confidence of the citizenry in government, argument that participation would exert undue influence is not persuasive) and *Eu,* 109 S.Ct. at 1019 (state had failed to submit " 'a shred of evidence' " that regulations of party internal affairs helped minimize party factionalism) (quoting Ninth Circuit opinion, 826 F.2d at 833, in turn quoting Civ. No. C-83-5599 (N.D. Cal. May 3, 1984) *with Jenness,* 403 U.S. 431, 91 S.Ct. 1970); *American Party of Texas v. White,* 415 U.S. 767, 782, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974); *Storer v. Brown,* 415 U.S. at 736, 94 S.Ct. at 1282; *Munro v. Socialist Workers Party,* 479 U.S. at 194-95, 107 S.Ct. at 537-38 (states are not required to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to imposition of reasonable restrictions on ballot access; otherwise, state's political system would have to sustain some level of damage before legislature could take corrective action).

has nothing to do with settling the internal divisions within a political party. Rather, a nonpartisan structure abandons the political party as a conduit for the electorate's views. Nonpartisanship envisions "direct representation of citizens rather than indirect representation through parties as intermediaries." Note, Local Nonpartisan Elections, Political Parties and the First Amendment, 87 *Colum.L.Rev.* 1677, 1679 (1987).

The interest asserted by the state was quite different as well: protecting political parties from disruption that might result if they were to make preprimary endorsements. "This interference with the parties' and their members' First Amendment rights was not justified by a compelling state interest for a State has a legitimate interest 'in orderly elections, not orderly parties.' " *Eu*, 109 S.Ct. at 1019 (quoting our opinion, 826 F.2d at 831).

The district court, on the other hand, recognized that *Eu* was not dispositive[16] but it proceeded by way of assumption, and was also apparently of the view that the issue was self-evident because it granted summary judgment without a record. Much as I respect Judge Zirpoli, I do not think the result in this case is self-evident. If, however, my only option were to decide what *is* self-evident, I would say that nonpartisan means no party and there is accordingly no less restrictive means of filling a no-party office, than a no party election. But I believe reasonable judges can reasonably differ on a sensitive issue such as this. It is therefore unsatisfactory that we should indulge our own instincts or experience.

There is a framework within which an objective analysis could be conducted that would be commensurate with the importance of this case. A logical starting point is how the Legislature has filled out the skeleton of the state's nonpartisan structure for judicial, school and municipal government. A "partisan office" means "an office for which a party may nominate a candidate," while a nonpartisan office is one whose holders have not been nominated in a partisan primary or identified on the ballot as affiliated with a political party, and who have not been elected on

[16] Order Denying Defendants' Motion to Vacate Judgement, Civ. No. C-87—4724 (N.D.Cal. June 9, 1988), 1-2.

a partisan ballot.[17] In 1986 the people of the state amended Section 6 of the California constitution to reaffirm that "[a]ll judicial, school, county, and city offices shall be nonpartisan" (§ 6(a)) and to provide that "[n]o political party[18] or party central committee may endorse, support, or oppose a candidate for nonpartisan office" (§ 6(b)).[19] This was done to continue a "long-understood ban on partisan electioneering in local and

[17] *See* n. 2, *supra*. These statutes could be taken to define what a "nonpartisan" election means. On the other hand, they could reasonably be characterized as merely the procedures for a nonpartisan election that the state has chosen so far. As such they would neither be definitive, nor indicative of how much baggage a nonpartisan election can carry and still be nonpartisan. There is no basis in the record in this case to make this kind of determination, one way or the other.

[18] Because "political party" is elsewhere defined to refer to ballot-qualified organizations, the parties affected are the Democratic Party (Cal.Elec.Code §§ 8500-8945), the Republican Party (§§ 9000-9510), the American Independent Party (§§ 9600-9745), and the Peace and Freedom Party (§§ 9750-9855).

[19] While it is irrelevant for constitutional purposes that the voters rather than a legislative body enacted § 6(b), *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295, 102 S.Ct. 434, 436, 70 L.Ed.2d 492 (1981), in this particular case it is not without significance that the decision to limit party endorsements in nonpartisan elections was made by the very people who are the members and the constituents of the parties whose speech was limited. Members of the state central committees are indirectly elected by the people. *See* Cal.Elec.Code 8660. Thus § 6(b) was not the product of a representative body acting out of paternalistic or preservationist instincts, but of the people themselves, hardening their own instrumentalities. *See Bellotti*, 435 U.S. at 791 n. 31 98 S.Ct. at 1424 n. 31 ("[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves"); *cf. Buckley*, 424 U.S. at 93-97, 96 S.Ct. at 670-72 (state may not "unnecessarily burden either a minority party's or an individual candidate's . . . interest in the continued availability of political opportunity") (citations omitted); *American Party of Texas v. White*, 415 U.S. at 780-81, 94 S.Ct. at 1305-06 (state must afford minority political parties a real and essentially equal opportunity for ballot qualification).

judicial elections"[20] which the California Supreme Court had concluded was not enforceable under the Constitution or statutes as then drafted.

Next, it makes sense to assess the burden § 6(b) imposes on political parties.[21] It does not prevent individuals or groups of

---

[20] Argument in Favor of Proposition 49 (to amend Section 6), California Ballot Pamphlet, Primary Election, June 3, 1986, p. 26. *See* Lee, *The Politics of Nonpartisanship* 102-104 (1960), and discussion in *Unger*, 37 Cal.3d at 616, 209 Cal.Rptr. 474, 692 P.2d 238.

According to Lee's survey, there was "public or openly visible activity" on the part of county committees, local political clubs, party officials or representatives in local city, county or school elections in only 25% of the counties surveyed. *Lee* at 102-103, Table 32. Whether there was any involvement in judicial elections even in those counties is unclear.

Regardless, it is incorrect to infer from Lee, as the majority appears to do, that political parties *endorsed* candidates for nonpartisan office in 25% of the counties prior to 1986. Majority opn., *supra*, at 282 ("Nevertheless, because the legal status of such endorsements was unclear, political parties did not endorse candidates in 75% of California counties"). Table 32, from which that statistic is drawn, concerns "public or openly visible activity," not endorsements. Table 33, which shows the type of political activity reported on the survey, indicates that public endorsement of candidates occurred in 4 counties (about 10%)—although there is no way of telling from the survey whether the occurrence was singular, sporadic or repetitive.

Referring to the Lee survey, or relying on it to suppose that party endorsements caused no harm to the nonpartisan structure before § 6(b) was adopted in 1986, illustrates why it is risky to make decisions based on assumptions without an evidentiary basis. While Lee is no doubt an able scholar, neither the methodology nor significance of the results he reports has been tested by cross-examination.

[21] When deciding whether laws that impinge on associational freedoms violate the First Amendment:

> [A] court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State, as justifications for the burden imposed by its rule. In passing judgment, the court must not only determine the legitimacy and strength of each of those interests: it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Tashjian, 479 U.S. at 214, 107 S.Ct. at 548-49 (quoting *Andersen v. Celebrezze*, 460 U.S. at 789, 103 S.Ct. at 1573). While the restrictions embodied in § 6(b) implicate both First and Fourteenth Amendment rights, *Eu*, 109 S.Ct. at 1020, the magnitude of the injury has to be measured against both the strength of the interest, and the alternatives available. The district court did not touch these bases because of its assumption that the state's interest was corruption and that alternative means would be less restrictive.

individuals (such as the California Democratic Council or "Democrats for Bradley") from making endorsements. Nor does it preclude political parties from speaking out on issues. For example, the Republican Party could support the building of a jail in Fresno and the Democratic Party could oppose it, even though candidate A for mayor was for the building of the jail and candidate B was against it. Narrowly construed, § 6(b) does not inhibit a political party from calling attention to a candidate's record and experience and qualifications. Further, the identification of candidates with particular parties plays much less of a role in the nurturing of an informed electorate for local, school and judicial offices, than for national (or state) elections.[22] To the extent that the natural focus of a ballot-qualified party is on issues of broad application and on partisan offices such as the Presi-

---

[22] States have a greater interest in regulating statewide or local elections than national elections. *Anderson*, 460 U.S. at 795, 103 S.Ct. at 1573. Indeed, one purpose of nonpartisan elections is to insulate state and local elections from the national issues that are the natural focus of national political parties. *See* note, Local Nonpartisan Elections, Political Parties and the First Amendment, 87 *Colum.L.Rev.* at 1679-81.

It is no answer to suggest, as did the dissent in the original panel opinion, that "[t]here may be no Republican, or Democratic, or Libertarian way to build a city jail but there may very well be Republican, Democratic or Libertarian positions on whether a jail should be built and who should be taxed for it." 880 F.2d at 1084. There is nothing about § 6(b) which would impede the Republican Party, or the Democratic Party, or the Libertarian Party, or the Peace and Freedom Party from expressing their views on such matters.

dency, the Congress, or the Governorship, party labels provide scarcely any "shorthand designation of the views of party candidates on matters of public concern" in connection with nonpartisan, specialized local elections.[23] This is especially so since candidates for nonpartisan office neither run as a party member, nor are labelled as such on the ballot.[24]

These factors should then be considered in light of the "super"-compelling importance of the state's interest in its chosen form of government, to determine if § 6(b) is narrowly tailored, whether there are less restrictive means that serve that interest, and whether alternatives work. The majority concludes that "the mere fact that § 6(b) targets the collective rather than the individual voices of party members does not suffice to render it 'precisely drawn.' "[25] I agree.[26] But the fact that it targets the collective voice only with respect to endorsements for nonpartisan offices may render it drawn as precisely as it can be,[27] for to preclude party endorsements in nonparty elections is the flip side of a candidate's running for nonpartisan office without party identification. It also conforms exactly to the California Election Code's definition of partisan office as one "for which a party may

---

[23] *See Tashjian*, 479 U.S. at 220, 107 S.Ct. at 551-52 ("To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise").

[24] Indeed Lee's survey includes an appraisal which shows that party activity helped in six cities where both Republican and Democrats were active, and made no difference in three; when only Democrats were active, it helped in two, made no difference in one, and hurt in two. Lee, *The Politics of Nonpartisanship* 104 (Table 34).

[25] Majority opn., *supra*, at 284-285.

[26] As *Bellotti* says, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." 435 U.S. at 777, 98 S.Ct. at 1416.

[27] The ban on support and opposition is more problematic. *See* discussion, *infra* at 304-305, and n. 40.

nominate a candidate."[28] and conversely to that of a nonpartisan office, for which a party may not nominate a candidate.

The "less drastic" possibilities posited by the district court (and adopted by the majority) may be links in the chain, but cannot serve the state's structural interest if there is any missing link. For example, Judge Zirpoli suggested that nonpartisan methods of nomination would be less restrictive. Clearly these serve the applicable interest. However, if nonpartisan methods of nomination were not supplemented by prohibiting party endorsements, the track to nonpartisan office would be virtually indistinguishable from the track to partisan office. Candidates are nominated for nonpartisan office by petition which may not disclose their party affiliation; those for partisan offices are nominated through partisan primaries. There would thus be no material difference between a nonpartisan method of *nomination*, with party endorsements as Judge Zirpoli suggests, and a partisan method of *election*.[29] Therefore it does not appear that the means of relying entirely on nonpartisan nomination methods, without the limitation in § 6(b), would work.[30] The district court's other suggestion,

---

[28] Cal.Elec.Code § 36.

[29] In other words, if Diane Feinstein, John Van de Kamp, and Pete Wilson were running for mayor, and if the Democratic Party endorsed Van de Kamp and the Republican Party endorsed Wilson, for all practical purposes the process would parallel the partisan track. The only difference would be that in the case of the nonpartisan track, the decision about which candidate would carry the party banner would be made by the party, not by the people as is their prerogative in the partisan track. The irony is, this would allow political parties even greater power in the nonpartisan track than in the partisan. That not only runs counter to what the voters intended when they amended Section 6 of the California Constitution, but would effectively destroy the nonpartisan system—and *that* runs counter to the intent of Article IV, § 4 of the United States Constitution.

[30] That certainly was the judgment of supporters of the amendment to Section 6. *See, e.g.*, an editorial in *The Sacramento Bee*, To Protect Non-Partisan Elections, which opined that "[t]he principal danger is that the decision [*Unger*] opens the way . . . to school boards whose members make curricular decisions according to the political orientation

prohibiting candidates from soliciting or collecting campaign funds from political parties, might serve the state's interest in corruption, but would only incidentally advance its interest in structure.[31]

Because the district court was considering corruption, it measured neither alternative against a structural interest that is "super"-compelling. While these or other means might work, there is no basis in the record for reaching a reasoned conclusion that they will or won't.

Instead, the final step in the analysis ought to be whether the state's interest in the nonpartisan structure of government, constitutionally recognized in the guarantee clause, warrants a burden of the sort imposed on the First and Fourteenth Amendment rights of a political party. Both the Congress and the Supreme Court have acknowledged that there is a difference of constitutional dimension between political activity by political parties and political activities of other organizations or individual political actors. In *Civil Serv. Comm'n v. Letter Carriers,* 413 U.S. 548, 565, 93 S.Ct. 2880, 2890, 37 L.Ed.2d 796 (1973), the Supreme

---

of the parties that support them and, worse, look toward advancement by the party as a reward for faithful service in 'non-partisan' positions. August 13, 1985, at B6, col.1 (final ed.) (editorial), *quoted in* 87 *Colum.L.Rev.* at 1681. *See also* California Ballot Pamphlet, p. 26 ("To assure that our courts will not be manipulated by political bosses, your yes vote on Proposition 49 [to amend Section 6] is absolutely necessary.").

[31] A Columbia Law Review Note proposes other means which the author suggests are also less restrictive: one would be to increase party competition, thereby rendering candidates less vulnerable to manipulation because they would have alternative means of support; another, to appoint administrative local officials rather than elect them. 87 *Colum.L.Rev.* at 1698-99. The former relates primarily to the state's interest in corruption but would turn its interest in structure on its head; the latter would too, in that presumably those administrative personnel would be appointed by persons elected in partisan elections. Neither means comports with a nonpartisan structure, and that is a choice both the guarantee clause and the Tenth Amendment leave for the people to make.

Court upheld the Hatch Act, which prohibited federal employees from involvement in political activity, against a First Amendment challenge. In so doing, it emphasized the right of government employees to be involved with everything except political parties.

Conversely there is nothing about the state's interest in the nonpartisan form of its local, school and judicial government that implicates the rights of anyone but a ballot-qualified political party from endorsing, opposing or supporting candidates for nonpartisan office. The same goes for the rights of a political party to espouse views on controversial issues, even when those views correspond to views held by a particular candidate.[32]

It was clear to the Court in *Letter Carriers* that the danger to proper government functioning presented by political party involvement was different in kind from the danger presented by the involvement of other organizations, ideas, considerations, or even by political actors of an independent stripe. In other words, in the

---

[32] The state could not, for example, justify a ban on endorsements by special interest groups on the ground that government should be "non-special interest." The state's interest in the structure of government goes to such things as whether it is to be partisan or nonpartisan, town meeting or city council, appointive or elective; the state could not rely on an interest stemming from the guarantee clause to justify a government based on religious beliefs or race or ideas. Such things have nothing to do with structure.

By the same token, if the state's asserted interest is *corruption,* its justification for banning endorsements by political parties is weakened because the corrupting effect of endorsements or support by a special interest group may be essentially the same. However, clout of a special interest group has no relevance to the state's interest in the *structure of government.* Special interest groups have no access to the ballot and their membership may cut across party lines. Their raison d'etre is to influence voters and officeholders issue by issue, sometimes in accord with the views of a political party, sometimes not. They are quintessentially non-party organizations. By contrast, political parties have ballot access, are comprised of persons of the same political persuasion, and exist to win elections and run governments. *See Moore v. Panish,* 32 Cal.3d 535, 186 Cal.Rptr. 475, 652 P.2d 32 (1982). They are quintessentially the opposite of non-party or nonpartisan.

political context nonpartisanship does not mean that an office-holder adheres to no causes or factions, or even that the office holder is not committed to the tenets or goals of a political party. It does mean that there should not be activity that gives (or seems to give) a party any power whatever over the holder of a nonpartisan office.

Accordingly, there is no reason inhering in the state's interest in the structure of its government that inhibits California from justifying its restriction on endorsements in this case.

II

Because the state's interest in the structure of nonpartisan government is so compelling, I do not believe it is necessary to reach the corruption issue. The majority does, but its approach is flawed in a way that affects its analysis of the state's justification for § 6(b). The majority focuses solely on financial corruption of the sort addressed in *Buckley, FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985), and *Austin v. Michigan Chamber of Commerce*, ___ U.S. ___, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), and purports to distinguish the kind of corruption "decried" by California in this case.[33] However it is clear that corruption can occur from *political* as well as financial debt. *See, e.g., Letter Carriers*, 413 U.S. at 565, 93 S.Ct. at 2890 (partisan political activities by government employees poses danger to "fair and effective government"); *Bellotti*, 435 U.S. at 788 n. 26, 98 S.Ct. at 1422 n. 26 (importance of government interest in preventing corruption of elected representatives through creation of political debts "has never been doubted"); *Buckley*, 424 U.S. at 26-27, 96 S.Ct. at 638. *Letter Carriers* is closely on point, implicitly recognizing that partisan politics may have a corrupting influence on a system designed to be nonpartisan.[34] The interest California

[33] Majority opn., *supra*, at 283.

[34] The Hatch Act does not prohibit political activity in connection with nonpartisan elections or with questions "not specifically identified with a National or State political party." 5 U.S.C. § 7326. Thus, it specifically addresses the corrupting influence that political party organizations have on the administration of the law in a nonpartisan context.

actually asserted in this case is not that endorsement by a political party corrupts the voter by influencing him or her to cast a ballot one way or the other;[35] rather, it is that endorsement corrupts the nonpartisan candidate and officeholder in the performance of his duties.[36] Along with the state's interest in preventing corruption of

[35] That would be indefensible. *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407; J. Ely, *Democracy and Distrust* 111 (1980) (state cannot regulate political speech because of "a fear of how people will react to what the speaker is saying"). It would also be inconsistent with the intent of the people when they adopted § 6(b). For example, the proponents argued:

> To assure that our courts will not be manipulated by political bosses, your yes vote on Proposition 49 is absolutely necessary.
>
> WHO WOULD TRUST THE FAIRNESS OF TRIALS TO JUDGES WHO WERE CHOSEN—NOT BECAUSE THEY ARE IMPARTIAL—BUT BECAUSE THEY OWE ALLEGIANCE TO THE POLITICAL PARTIES WHICH GOT THEM ELECTED?
>
> WHO WANTS TO RELY ON THE DECISIONS OF JUDGES WHO ARE CHOSEN—NOT BECAUSE THEY ARE WISE OR BECAUSE THEY KNOW THE LAW—BUT BECAUSE THEY HAVE PROMISED TO TOE THE PARTY LINE?
>
> Californians do not want their judges to become beholden to political parties.
>
> UNLESS YOU VOTE YES ON PROPOSITION 49, JUDGES MAY WELL BE INDEBTED TO PARTY BOSSES TO WIN ELECTIONS. THEIR JOBS WILL DEPEND ON IT.
>
> Local officeholders support this amendment and are equally concerned that partisan electioneering will harm decision-making at the local level. They are concerned that the more they have to rely on money, help, and endorsements from political machines, the more they will owe the political machines.
>
> Local officeholders do not want to have to check with the party bosses before they make decisions important to their constituents!

California Ballot Pamphlet at 26.

[36] Everyone knows, for example, that Mayor Bradley is a Democrat. That knowledge—or the communication of information that the Democratic Party or some group identifying itself with Democratic causes

that sort, "[p]reservation of the individual citizen's confidence in government is equally important." *Bellotti*, 435 U.S. at 789, 98 S.Ct. at 1422.

Even if a limitation on speech does keep information from the voters, *Buckley* teaches that it is permissible if there is a compelling state interest balanced against a marginal burden on First Amendment rights. Applying *Buckley* to § 6(b) suggests that endorsements are more analogous to large campaign contributions than to independent expenditures; unlike independent campaign expenditures, endorsements are prearranged and coordinated.[37] Unlike a contribution, however, endorsement itself creates the corruption, not the *amount* of endorsement. The state therefore has a justification for banning endorsements that neither the district court nor the majority recognizes.

The majority also relies on *Austin* in concluding that the kind of corruption at issue here is different from that reached elsewhere. While the relevance of *Austin* to this case is by no means clear, it is not unambiguous. However tempting it may be to whitewash its holding or pick and choose what it says, the Court can fairly be read to suggest that the state's interest in avoiding corruption is reasonably furthered by restricting speech, in the form of expenditures, by organizations which have amassed political "war chests" with the aid of legal advantages conferred by the state. As ballot-qualified parties have that status by virtue of

favors his election as Mayor—would not likely spoil anyone but the candidate. As the Mayor's brief in this case points out, the problem is not "the impact that endorsements may have on voters' choices but rather [their] indirect impact on elected officials' independence from partisan political pressures."

[37] Declaration of Richard Mountjoy, E.R. 72. (Although I have some concern about citing the Mountjoy Declaration because it arguably was not part of the summary judgment record, it was apparently reviewed in connection with the motion to vacate. In any event what he says is a matter of common sense: it is unlikely that a party endorsement would appear on the ballot information pamphlet unless the candidate had agreed to it.) Opposing or supporting a candidate, on the other hand, is closer to a restriction on independent expenditures, which *Buckley* declined to approve.

statute in California, it could be said that they, too, have amassed their clout with the aid of legal advantages conferred by the state such that, in the context of a nonpartisan election, their "war chest" would have a correspondingly corrosive effect.[38]

III

We have an obligation to construe any law, if fairly possible, to avoid raising doubts of its constitutionality. *New York v. Ferber*, 458 U.S. 747, 769-70, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113 (1982); *Letter Carriers*, 413 U.S. at 571, 93 S.Ct. at 2892. However, neither the district court nor the majority tries to do so.

The issue in this case is whether the City of San Francisco erred in not permitting party endorsements to appear on the official San Francisco Voter Pamphlet, in reliance on § 6(b). It is not necessary to construe § 6(b) as the majority does, as "impos[ing] a total ban on any partisan gesture of support for or opposition to a candidate."[39]

Not even plaintiffs assert that the ban encompasses "any partisan gesture of support.'" Plainly it does not: parties are free to speak out on issues and relate those issues to a candidate; partisan sub-groups are free to do anything they want in as partisan a way as they choose.

More significantly, § 6(b) can be construed to prohibit only endorsements, and not to extend to communications about the candidates' qualifications, position on the issues, experience or platform. It can also be construed as applying only to public endorsements, or endorsements on the official voter information

[38] *See also California Medical Ass'n v. FEC*, 453 U.S. 182, 201, 101 S.Ct. 2712, 2724, 69 L.Ed.2d 567 (1981). In upholding limitations on union and corporate campaign activity, the Supreme Court states that the "differing structures and purposes" of entities "may require different forms of regulation in order to protect the integrity of the electoral process." The Court further distinguished restrictions placed on individuals and unincorporated associations, on the one hand, and unions and corporations on the other.

[39] Majority opn., *supra*, at 285.

pamphlet. In any event it could be construed not to apply to recommendations made to members. *See, e.g., United States v. CIO,* 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948) (declining to construe § 313 of the Corrupt Practices Act to prohibit corporations and unions from expressing views on candidates directly to members). To the extent § 6(b) provides that a political party may not "support or oppose" a candidate for nonpartisan office, it may be too vague or too encompassing to be enforced. If excision of those terms will narrow the statute so that it can be constitutional, the necessary surgery should be performed.[40] *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 502, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985).

IV

It is particularly troubling in this case that there is virtually no record.[41] There is, for example, no evidence showing whether the relative voice of political parties has been unduly significant or influential in nonpartisan elections where endorsements have

---

[40] To eliminate the ban on opposition and support would also decrease the appearance of prearrangement and coordination that *Buckley* found to be indicators of corruption. To the same extent, the risk of a direct quid pro quo is lessened. Limiting § 6(b) to endorsements would also obviate the problem of how to enforce a restraint on "opposing" or "supporting" on the margin, for instance, whether Republican Party opposition to Mayor Bradley's campaign for Governor (a partisan office) would violate its obligation not to "oppose" him in his capacity as a candidate for, or officeholder of, the mayoralty (a nonpartisan office).

[41] The case comes to us in a curious posture. Relating to the issues presented in this case and in connection with the motion for summary judgment, the plaintiffs produced the affidavits of Arlo Hale Smith and Terence Falkner. These declarations went to standing, not to substantive issues. The city presented no evidence in opposition. Subsequently, the City submitted several declarations in connection with its motion to vacate, as did plaintiffs in opposition. In denying the motion to vacate, the district judge indicated that he had reviewed the motion but was not persuaded to change his decision. In that sense, the declarations are a part of the record. However, it is unclear that they form any part of the basis of the district's order granting partial summary judgment.

occurred. Nor is there any evidence bearing on feasibility of alternate means to aid the state's interest. The absence of a record leads inexorably to judges judging on their own instinct or experience.

This case presents an issue of fundamental importance to the State of California, and concerns an interest of the people that lies within the heartland of the Constitution. That being so, we should not conclude that California's concern is not compelling enough, without searching inquiry and an adequate record.

I would, therefore, reverse and remand.[42]

ALARCON, Circuit Judge, dissenting:

I respectfully dissent from the majority's opinion. I concur in Judge Rymer's conclusion that the State of California has a compelling interest in maintaining the nonpartisan structure of local, judicial, and school elections that is protected by the guarantee clause. I write separately because it is my view that the district court and the majority have failed to consider properly the evidence in the record and the lessons of California's history regarding the devastating impact that party endorsement can have on the integrity of local office holders and on the independence of its judiciary.[1]

California judges, unlike the members of this court, are not appointed for life. California trial judges must run for reelection every six years against any opponent who has practiced law for the minimum number of years and has not been convicted of a crime. Cal. Const. art. VI, § 16(b), (c) (West Supp.1990). Its appellate judges must run on their record in an uncontested election every

---

[42] *See Mandel v. Bradley,* 432 U.S. 173, 177-78, 97 S.Ct. 2238, 2241, 53 L.Ed.2d 199 (1977) (remanded "to permit further findings with respect to the extent of the burden imposed" by state electoral regulations).

[1] I agree with Judge Reinhardt that an endorsement by a political party in a non-partisan election is less evil and corrupting than "massive political contributions." *Ante at* 287. The question whether California can constitutionally slay that dragon, however, is not before us in this matter.

12 years. *Id.* § 16(a), (d). By adopting subsection (b) of article II, section 6 of its constitution, California has wisely chosen to prevent political parties from imposing on candidates for judicial office "litmus tests" of their views on contemporary social and political issues as the price of a partisan endorsement.

California adopted nonpartisan elections to end political control of local, school, and judicial offices by greedy and unscrupulous party officials and morally corrupt public officeholders. The majority's holding will dismantle the structure erected by California citizens to provide them with local officials who have not compromised their views or made improper commitments to gain party endorsement and win an election.

I

CALIFORNIA'S POLITICAL PAST: A CORRUPT BEGINNING

The philosopher, George Santayana, warned us that "[t]hose who cannot remember the past are condemned to repeat it." G. Santayana, 1 *The Life of Reason* 2284 (1905). The voters adopted subsection (b) on June 3, 1986 because they wanted to avoid a repetition of the pervasive corruption of public officials that existed in California prior to the political reformation that began in 1911 under the leadership of Hiram Johnson.

In the latter part of the nineteenth century, the founders of the Southern Pacific Railroad, Collis P. Huntington, Leland Stanford, Charles Crocker, and Mark Hopkins, known as the "Big Four," dominated California politics. *California Politics and Policies* 4 (E. Dvorin & A. Misner eds. 1966) [hereinafter *California Politics*]. "[T]here was hardly an office, from the seats in the United States Senate down through the governorship and the courts to the most inconsiderable town office, in which the right man could not do the railroad a service." J. Caughey & N. Hundley, *California: History of a Remarkable State* 281 (4th ed. 1982) [hereinafter J. Caughey]. Illustrative of the arrogant confidence of the "Big Four" regarding its political dominance is the threat made by Charles Crocker to the Los Angeles City Council: "If this be the spirit with which Los Angeles proposes to

deal with the railroad upon which the town's very vitality must depend I will make grass grow in the streets of your city." *California Politics, supra*, at 4.

Wholesale civic corruption in San Francisco led to political reform of California's local elections. In 1901, attorney Abraham Ruef, the leader of the Union Labor Party, was successful in capturing the mayor's office for his candidate, Eugene E. Schmitz, a theatre musician. In 1905, Ruef was successful in bringing about the election of his full slate of supervisors. J. Caughey, *supra*, at 282. In addition, Ruef controlled the police force and the city's franchise board and "used utility rates as a means of political payoff." J. Owens, E. Costantini & L. Weschler, *California Politics and Parties* 33 (1970). "Ruef's machine exacted tribute from saloons, gambling houses, bordellos, French restaurants, prize fights, and the like, but its more ambitious levies were upon telephone, gas, water, and streetcar companies." J. Caughey, *supra*, at 282.

After the 1906 earthquake, the Ruef machine found "even greater opportunities" for graft. *Id.* at 283. The people of San Francisco were, as now, enchanted with their cable cars. They did not want any overhead trolleys to spoil the beauty of their city. Shortly after the earthquake, however, the Ruef machine, making use of allegations that tremors had closed the cable slots, succeeded in granting the United Railroads Company a blanket franchise to install trolley lines. *Id.*

The Ruef machine's political exploitation of the devastation caused by the earthquake resulted in a mass meeting called to denounce corruption in San Francisco. *Id.* Thereafter, District Attorney William H. Langdon announced that charges of graft and malfeasance in office would be presented to the grand jury. *Id.* The mayor's response to this announcement was to attempt to remove the district attorney from office and replace him with Ruef. *Id.* Langdon, however, obtained an injunction to prevent Ruef from taking over the prosecutor's office. *Id.*

During the grand jury investigation 17 out of 18 supervisors testified that they had taken bribes. *Id.* at 284. The grand jury returned 70 indictments against Ruef. *Id.* at 283-84. During one

of the trials against Ruef, Francis J. Heney, the chief prosecutor, was shot down in open court by a juror. *Id.* at 284. His assailant was found dead in his cell. *Id.* Hiram W. Johnson, a successful San Francisco attorney, volunteered to step in and take over the prosecution of Ruef. *Id.* Ruef was convicted and sentenced to 14 years in prison. *Id.*

Meanwhile, appalled by the manipulation of the 1906 Republican State Convention by the Southern Pacific Railroad's political henchmen, newspaper editors and publishers advocated the adoption of a direct primary system in California to permit the membership of each party to have a voice in the selection of its candidates. *California Politics, supra,* at 24-25. In the 1908 election, an overwhelming majority of voters voted to adopt an amendment to the California Constitution to institute a direct primary system. B. Hyink, S. Brown, & E. Thacker, *Politics and Government in California* 25 (10th ed. 1979) [hereinafter B. Hyink].

Hiram W. Johnson was nominated as a reform candidate for governor in the 1910 Republican primary. Johnson promised to "kick the Southern Pacific Railroad out of the Republican Party and out of state government." J. Caughey, *supra,* at 288. Johnson won the Republican nomination by defeating four candidates, including a candidate endorsed by the railroad. B. Hyink, *supra,* at 25. In 1911, Governor Hiram Johnson embarked on a program of legislative reform that included statutes that, by 1913, succeeded in effectively barring political parties from participation in the nomination process for nonpartisan candidates. *See Unger v. Superior Court,* 37 Cal.3d 612, 617, 692 P.2d 238, 241, 209 Cal.Rptr. 474, 477 (1984) (*Unger II*). The reform of California politics begun under Governor Johnson in 1911, including the elimination of judicial and local offices from party control, was described by Theodore Roosevelt as "the most comprehensive program of constructive legislation ever passed at a single session of an American legislature." J. Caughey, *supra,* at 289. The language of article II, section 6(a) of the California Constitution, adopted in 1972, is the embodiment of Governor Johnson's reforms. It provides: "Judicial, school, county, and city offices shall be nonpartisan." Cal. Const. art. II, § 6(a).

II

ENDORSEMENTS IN NONPARTISAN ELECTIONS EXPRESSLY EXCLUDED

Sixty-eight years after Johnson began his crusade of political reform, the Marin County Democratic Central Committee attempted to involve itself in a nonpartisan election. On or about September 1, 1979, the Marin County Democratic Central Committee "invited all registered Democrats who were candidates for the governing board of the district to attend a September 6, 1979, meeting of the County Central Committee *to seek the endorsement* of the County Central Committee and *to apply for financial assistance.*" *Unger v. Superior Court,* 102 Cal.App.3d 681, 683, 162 Cal.Rptr. 611, 612 (1980) (*Unger I*) (emphasis added), *cert. denied,* 449 U.S. 1131, 101 S.Ct. 952, 67 L.Ed.2d 118 (1981). The Marin County Democratic Committee publicly endorsed four candidates. *Id.,* 162 Cal.Rptr. at 612.

Samuel Unger, a candidate for election as a member of the governing board of the Marin County Community College District, did not attend the meeting or seek endorsement. Instead, he filed a petition in the Superior Court of Marin County, seeking to enjoin the County Central Committee from endorsing or supporting candidates for nonpartisan office. *Id.* Unger argued that the County Central Committee's endorsement violated article II, section 6 of the California Constitution and section 37 of the Elections Code. Section 37 provides: " 'Nonpartisan office' means an office for which no party may nominate a candidate. Judicial, school, county and municipal offices are nonpartisan offices." The Superior Court of Marin County denied the petition without leave to amend and ordered the action dismissed. *Id.* at 684, 162 Cal.Rptr. at 612.

The California Court of Appeal for the First District, Division Two, concluded in *Unger I* that,

> the explicit and unqualified language of Article II, section 6 prohibits a political party and, in particular, a county central committee of a political party, from endorsing, supporting, or opposing a candidate for the office of governing members of the board of a community college district, a nonpartisan school

office within the meaning of the constitutional provision, in any election.

Id. at 686, 162 Cal.Rptr. at 613-14. On May 22, 1980, the California Supreme Court denied an application for a hearing of *Unger I.* Justices Stanley Mosk and Frank Newman voted to grant the application.

On March 9, 1982, Samuel Unger and others filed a petition in the Superior Court of San Francisco seeking to restrain the Republican Party of California from recommending a negative vote in a retention election regarding three justices of the California Supreme Court. Only three of the seven members of the California Supreme Court sat on this matter. Four retired members of the Californa Courts of Appeal[2] were assigned to hear this appeal. Justice Mosk, joined by Justice Files and Justice Janes, concluded that article II, section 6 did not prohibit a political party from endorsing, supporting, or opposing candidates for a nonpartisan office. *Unger II,* 37 Cal.3d at 620, 692 P.2d at 243, 209 Cal.Rptr. at 479. Justice Mosk, however, did not purport to discuss the propriety or wisdom of a law that would bar endorsements on nonpartisan elections: "Our conclusion in this case is reached without consideration of policy questions. *We are not unmindful of the persuasive reasons why it is preferable for political parties to refrain from endorsing or opposing nonpartisan candidates.* However, that is a matter for consideration by the Legislature; it, not the judiciary, is the proper body to impose regulations in the conduct of political parties." *Id.,* 692 P.2d at 243-44, 209 Cal.Rptr. at 479-80 (emphasis added).

Justice Malcolm Lucas filed a concurring opinion in which he stated as follows:

> I concur, albeit reluctantly, in the majority opinion. My agreement stems from my conclusion that Justice Mosk has correctly interpreted the scope of the existing restrictions im-

[2] The four assigned justices were retired Presiding Justice Gordon L. Files, retired Associate Justice Bertram D. Janes, retired Associated Justice Richard M. Sims, Jr., and retired Associate Justice Rodney K. Potter.

posed by the Legislature and the California Constitution. My reluctance flows from my concern about the effect of our ruling in light of important social and political policy considerations expressed by Justice Sims in his dissent. *I think there is a strong state interest in preserving the nonpartisan nature of the offices involved and that this interest will be sorely tried if political parties engage in wholesale endorsement of and opposition to candidates for "judicial, school, county, and city offices . . . ."* (Cal. Const. art. II, § 6.)

Because this interest is so important, I cannot join in Justice Grodin's approach. His conclusion that the First Amendment may well bar restrictions on political endorsements of candidates for nonpartisan office is premature. The Legislature may be able to fashion a permissible limitation on partisan involvement in nonpartisan campaigns after careful scrutiny of the various interests at stake. I do not think that at this stage we should sweepingly discourage such an attempt. The majority opinion, of course, does not take that path.

Id. at 625, 692 P.2d at 247, 209 Cal.Rptr. at 483 (Lucas, J., concurring) (emphasis added).

Justice Joseph Grodin filed a concurring opinion in which he commented that if article II, section 6 had been construed by the majority to bar a political party from endorsing, supporting, or opposing a candidate for nonpartisan office, the statute would violate the first amendment to the United States Constitution. *Id.* at 621, 692 P.2d at 244, 209 Cal.Rptr. at 480 (Grodin, J., concurring). Retired Courts of Appeal Justice Sims concurred in the order of the court discharging the writ as moot. Justice Sims, joined by Justice Potter, expressed the view that "the state, in pursuit of the laudable aim of freeing judicial offices from partisan consideration has properly served *a compelling interest* by limiting the elections in which the statutorily created party may officially participate." *Id.* at 626, 692 P.2d at 247, 209 Cal.Rprt. at 483 (Sims, J., concurring) (emphasis added).

It is clear from the majority opinion and the observations of Justices Lucas and Sims that six members of the seven-person panel were of the view that there are "persuasive reasons why it is

preferable for political parties to refrain from endorsing or opposing nonpartisan candidates." *Unger II,* 37 Cal.3d at 620, 692 P.2d at 243-44, 209 Cal.Rptr. at 479-80. The factual justification for precluding party endorsement was not set forth in Justice Mosk's opinion. The sordid background of party control and corruption of judicial and local offices was eloquently set forth, however, in Justice Sims' concurring opinion. *Id.* at 631, 692 P.2d at 251, 209 Cal.Rptr. at 487 (Sims, J., concurring). Thus, six out of seven members of the *Unger II* court appear to have been persuaded that a compelling interest still existed in 1984 that would support a law in California barring official endorsement or opposition by political parties.

In response to the majority's interpretation of California's article II, section 6 in *Unger II* as not *expressly* precluding party endorsement or opposition in a nonpartisan election, Assemblyman Richard Mountjoy introduced Assembly Constitutional Amendment 7 to add subsection (b) to article II, section 6. California voters adopted subsection (b) by a vote of 2,292,678 to 1,805,305 on June 3, 1986. Thus, the reformation of California law to protect the independence of the judiciary and remove local offices from the control of political parties, which began in 1911, was completed 75 years later. In 1986, a majority of Californians approved an initiative that expressly spelled out that the political reforms inspired by Hiram Johnson's populist political revolution cannot be fulfilled if party endorsement or opposition of nonpartisan candidates for judicial and local office is tolerated.[3]

---

[3] The initiative was presented to the voters in this manner:

To assure that our courts will not be manipulated by political bosses, your yes vote on Proposition 49 is absolutely necessary.

WHO WOULD TRUST THE FAIRNESS OF TRIALS TO JUDGES WHO WERE CHOSEN NOT BECAUSE THEY ARE IMPARTIAL—BUT BECAUSE THEY OWE ALLEGIANCE TO THE POLITICAL PARTIES WHICH GOT THEM ELECTED?

WHO WANTS TO RELY ON THE DECISIONS OF JUDGES WHO ARE CHOSEN—NOT BECAUSE THEY ARE WISE OR BECAUSE THEY KNOW THE LAW—BUT BECAUSE THEY HAVE PROMISED TO TOE THE PARTY LINE?

III

INDEPENDENCE OF THE JUDICIARY: A COMPELLING CALIFORNIA IMPERATIVE

California's determination to eliminate political party domination of judicial and local office holders because of its sad experiences with the impact of party influence on the integrity and independence of elected officials led inexorably to the adoption of subsection (b). As noted by Judge Trott in the majority opinion in *Geary v. Renne,* 880 F.2d 1062 (9th Cir.1989), *reh'g granted en banc,* 895 F.2d 1230 (9th Cir.1990), this court should not ignore "the importance of considering a law in the context of the historical circumstances that gave rise to it." *Id.* at 1073.

The majority has failed to consider or discuss the devastating effect that California's political parties had on the integrity and independence of its judges and local office holders as the result of payoffs, graft, and corruption. This sordid record inspired the populist revolution against the corrupt domination by political parties over the daily lives of California's citizens. I believe that California's voters have applied inspired logic to eliminate the evils brought about by party control of judicial and local office elections, by enacting legislation to make these offices nonpartisan. I agree with my colleagues that subsection (b) places a burden on first amendment rights requiring strict scrutiny to determine whether the state has demonstrated that this restriction

---

Californians do not want their judges to become beholden to political parties.

UNLESS YOU VOTE YES ON PROPOSITION 49, JUDGES MAY WELL BE INDEBTED TO PARTY BOSSES TO WIN ELECTIONS. THEIR JOBS WILL DEPEND ON IT.

Local officeholders support this amendment and are equally concerned that partisan electioneering will harm decision-making at the local level. They are concerned that the more they have to rely on money, help, and endorsements from political machines, the more they will owe the political machines.

Local officeholders do not want to have to check with the party bosses before they make decisions important to their constituents!

California Ballot Pamphlet at 26.

on protected activity is supported by a compelling state interest. Majority op. at 283 (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 109 S.Ct. 1013, 1019-20, 103 L.Ed.2d 271 (1989)). None of the cases cited by the majority, however, analyzes the question whether a state may burden first amendment rights by precluding party endorsements in nonpartisan elections.

In this case, the record amply demonstrated that subsection (b) is necessary to meet California's compelling interest in maintaining the independence of the judiciary. Regrettably, the majority make no reference to the compelling and uncontradicted testimony presented to the district court by former Associate Justice Winslow Christian. Justice Christian clearly qualifies as an expert on the potentially devastating impact of politics on judicial independence in California. Justice Christian served as a trial judge in Sierra County for four years. He was an associate justice of the California Courts of Appeal for 17 years. He was also the Executive Director of the National Center for State Courts for several years. Justice Christian testified that this position enabled him to study the judicial selection and tenure systems in many states. He also "learned that in certain states partisanship in judicial elections has damaged the reputation of the judiciary." Justice Christian declared:

> [ ] The state of California has a compelling interest in the independence and integrity of its judiciary. Even the mere appearance of improper influence over members of the judiciary erodes the public's confidence in its officials and institutions.
>
> [ ] In my opinion, the independence of the California judiciary which is subject to election or public confirmation has depended upon the nonpartisan nature of judicial elections. Permitting partisanship in the process of nominating, selecting and retaining judges would force judges to seek party endorsements. This process would create a risk of judicial candidates being tempted to promise to take party positions on legal issues which are pending or likely to arise. This harmful feature of partisanship in judicial elections has damaged the reputation of the judicial systems of certain other states known to me. The

> mere possibility of such political "deals" would undermine public confidence in the administration of justice.
>
> [ ] Endorsements of judicial candidates by political parties differs from endorsements by other groups or individuals because political party endorsements tend to call for commitments on political and social issues conflicting with the overriding commitment a judge should hold to . . . fair and unbiased administration of justice.
>
> [ ] In my opinion, therefore, partisan endorsements in nonpartisan judicial elections undermine the state's compelling interest in the independence and integrity of its judiciary.

By voicing his concern that a political party would expect a judicial candidate to adopt its platform on controversial issues that are likely to come before the court, Justice Christian sharply focuses on the clearest threat to the independence of the judiciary presented by permitting political parties to endorse or oppose a candidate for a nonpartisan office. As illustrated by the letter sent to candidates for a nonpartisan office in *Unger I*, 102 Cal.App.3d at 683, 162 Cal.Rptr. at 612, political parties are interested in learning whether those persons soliciting their endorsement and financial support are loyal and registered members of their political organizations and whether they hold views that are faithful to their platforms.

The 1990 California Democratic Party platform contains the following positions on issues important to that political group:

> The Agricultural Labor Board, which held such promise for often exploited farm workers, has suffered from appointees and policies hostile to the interests to farm workers. . . .
>
> There should be an immediate halt to off-shore oil development. . . .
>
> We call for a halt to the production, use, and development of nuclear power until safe methods of mining, transport, and disposal of nuclear waste are available. . . .

We must eliminate the use of pesticides and other agricultural chemicals found to be harmful to humans, the environment or food production. . . .

Students with limited English proficiency must have every opportunity to learn English through strong bilingual education. . . .

Race has been found to influence the likelihood that a person charged with capital murder will receive the death sentence, with minorities more likely to face execution and longer sentences. . . .

The California Democratic Party believes that reproductive freedom of choice is every woman's fundamental right and that such a decision is private. . . .

We pledge to actively oppose efforts to further erode the application of the 1973 *Roe v. Wade* Supreme Court decision on abortion rights.

In view of the 1986 United States Supreme Court decision in *Bowers v. Hardwick* [ ], the California Democratic party supports the repeal of all laws that criminalize private sexual conduct between consenting adults.

California Democratic Party 1990 Platform 5, 7, 8, 12, 17, 19, 21 (Democratic State Cent.Comm.1990).

The most recent California Republican Party Platform was adopted in 1988. It includes the following issues in its listing of the Republican Party's highest priorities:

The Republican Party steadfastly opposes the unwarranted grape boycott. . . .

A new chairperson, general counsel, and majority have been appointed to the Agricultural Relations Board to provide fairness and balance for farmers as well as farm workers. . . .

The health and welfare of the worker, grower and consumer are uppermost in the minds of California agricultural officials when dealing with pesticides. . . .

Governor Deukmejian and the Republican Party fully support implementation of the death penalty. . . .

The Republican Party supports reasonable limits on the growth of state welfare expenditures. . . .

The more state government taxes, spends, borrows and regulates, the less room there is for the private sector to grow. Unlike the Democratic Party, Republicans believe in a limited government, which taxes and spends only what is necessary to provide essential state services. . . .

The Republican Party believes that all laws, practices and customs that constrain or otherwise adversely influence qualified people's movement between education and jobs, from choice of occupation and disincentives to seeking gainful employment should be removed. . . .

1988 California Republican Platform 2, 4, 9, 12 (California Republican Party 1988).

Before making an endorsement or offering financial assistance, it is reasonable to assume that a political party will conduct an inquiry to ascertain whether the views of the candidate are consistent with the party's political stand. It is self-evident that a political party would not endorse or spend money to support a person whose views are antagonistic to its platform.

Almost every contemporary social issue from abortion to vivisection can result in a lawsuit seeking a declaration by a judge on the merits of the controversy. What kinds of questions might be posed to the judicial candidate seeking endorsement or financial support of his political party? Candidates in recent California elections have been asked for their views by political reporters on the following contemporary and social issues:

1. Do you believe that the death penalty violates the eighth amendment's prohibition against cruel and unusual punishment?

2. Do you agree with the five-person majority in the Supreme Court that the first amendment protects burners of the American flag?

3. Do you believe that a pregnant woman has the unrestricted right to choose whether she will have an abortion for gender preference purposes?

4. Do you believe that the federal Constitution authorizes a state governor to make political appointments based solely on a quota system without regard to merit? For example, should women be selected to fi.. all job vacancies until they comprise 50% of our state government's work force?

5. Do yo believe that blacks should be given preference over white applicants, without proof that an employer discriminated, to make up for the fact that slavery was protected by law, and racist practices have denied blacks equal rights in this country?

6. Should oil drilling be permitted off California's beautiful coastline?

7. Should our environmental protection laws be interpreted so as to protect spotted owls and old trees notwithstanding the fact that thousands of jobs will be lost?

8. Do you believe that we should concentrate our tax dollars on treating and rehabilitating addicts instead of building more prisons to lock up narcotics offenders for long prison terms?

9. Do you believe that handgun control laws are in conflict with our rights under the second amendment?

10. Do you believe that state laws restricting the type of jobs that can be performed by AIDS patients violate the federal Constitution?

11. Do you believe in decriminalization of the use and possession of drugs?

12. Do you believe that illegal aliens should be denied welfare benefits?

13. Do you believe that all drunk drivers, including first offenders, should be imprisoned, instead of receiving fines or probation, because they are all potential killers?

14. Do you believe that all juvenile gang members, regardless of their age, should be sentenced as adults so as to deter gang membership?

15. Do you believe our no-fault divorce laws have resulted in forcing women with children into poverty while former husbands continue to maintain their lifestyles, especially upon remarriage?

16. Do you believe it is appropriate for a judge to give a defendant less punishment than he deserves in exchange for a plea of guilty?

17. Do you believe it is appropriate for judges to order local officials to change the size or shape of electoral district boundaries so as to ensure the election of a member of a minority?

18. Do you believe that rent control laws force private citizens to subsidize low-cost housing?

19. Do you favor consolidating school districts such as Beverly Hills, Santa Monica, and Los Angeles to achieve integration and avoid mandatory busing?

20. Would you uphold the constitutionality of a statute that required all *able-bodied persons* to work on a public project in exchange for welfare benefits?

21. Do you believe that all court-made rules that exclude relevant evidence in criminal cases solely because "the constable blundered" should be overturned?

22. Do you favor limiting damages in civil personal injury cases to out-of-pocket expenses such as medical bills and loss of wages in order to decrease the cost of insurance?

23. Do you believe in a free market economy or do you favor government regulation?

24. Do you believe that we should "soak the rich" or "reduce taxes for the wealthy to stimulate investment," or that everyone should pay approximately the same percentage of his or her income to pay for government benefits and services?

25. Do you believe that mandatory drug testing should be a condition of employment?

Without a law barring endorsement of candidates for judicial office, we can reasonably expect that curious members of screening committees will ask similar questions to test the social and political philosophy of persons soliciting party endorsement or financial support. A sturdy and resolute candidate mindful of the canons of ethics for judicial candidates, should, of course, refuse to answer any of these questions. A frightened incumbent who has been subjected to media criticism for an unpopular decision, or a less scrupulous, politically lean and hungry[4] aspirant for judicial office might be tempted, as predicted by Justice Christian, "to promise to take party positions on legal issues which are pending or likely to arise."[5]

---

[4] *See* W. Shakespeare, *Julius Caesar,* act I, scene ii, 11. 194-95 ("Yond Cassius has a lean and hungry look. . . *such men are dangerous.*" (emphasis added)).

[5] The fact that social issues can be successfully exploited to influence the outcome of a contested judicial election is vividly illustrated by the political fate of Los Angeles Superior Court Judge Alfred Gitelson in the 1970 general election.

Sometime prior to 1970, Judge Gitelson ordered the Los Angeles Unified School District to integrate its classes. Judge Gitelson sought reelection in 1980. Attorney William P. Kennedy ran against Judge Gitelson and forced him into a runoff election. The day after the primary election, Mr. Kennedy summarized his campaign in the following press statement:

> My objection to the judge is based primarily on his decision requiring school integration by forced bussing. . . . [This election is] a referendum by the voters of Los Angeles on the issue. If they want forced bussing, vote for Gitelson, if not, vote for me.

Boyarsky, *Gitelson Forced into Runoff: Bussing Is Issue, His Foe Says,* L.A. Times, June 4, 1970, at 24, col. 3.

Mr. Kennedy did not explain to the press that his public position on a matter pending in the court system would, of course, compel his recusal, if elected, on any matter involving school integration or "forced bussing."

Judge Gitelson defined the issue raised by Kennedy's campaign strategy differently:

Because of the real possibility that candidates will have to undergo such an inquisition in pursuit of the dangling carrots of financial support and party endorsement, subsection (b) of article II, section 6 serves California's compelling interest in safeguarding the independence of its judiciary.

Justice Christian's testimony and the historical evidence of the disastrous impact on the independence of the judiciary and the integrity of local officials that resulted from party selection and endorsement was uncontroverted at these summary judgment proceedings.

The historical record shows that, while California's political parties still controlled local elections, one political leader threatened the City Council of Los Angeles with the economic destruction of the community and another bribed 17 out of 18 members of the San Francisco Board of Supervisors. The burden of showing that the citizens of California have a compelling state interest in avoiding Mephistophelean compacts[6] between political

---

> If judges are going to make their decision[s] on the basis of what people would like, then there can't be any justice.

Id. at 1, col. 5. Judge Gitelson lost the election to Mr. Kennedy on November 3, 1970. The Supreme Court of California affirmed Judge Gitelson's decision on June 28, 1976, *Crawford v. Board of Educ.,* 17 Cal.3d 280, 551 P.2d 28, 130 Cal.Rptr. 724 (1976).

If the Kennedy-Gitelson election campaign were being conducted in this election year, without the protection of subsection (b) of article II, section 6, the political parties would have the opportunity to endorse or oppose the candidates' positions in this nonpartisan election. If a party adopted Mr. Kennedy's point of view, either out of conviction or simply because he is a loyal member, it would be entitled to endorse him and ask the voters to vote "no" on bussing. By the same token, another party would be free to support Judge Gitelson, regardless of his views or qualifications, to avoid losing that office to a candidate who was registered with a rival political organization. The people of California have wisely chosen to preclude the injection of state central committee partisan concerns and "priorities" in elections dealing with local problems that require nonpartisan solutions.

[6] I will bind myself to your service in this world.
To be at your beck and never rest nor slack;
When we meet again on the other side,

parties and nonpartisan candidates has been met by the officials of the City and County of San Francisco who are parties to this action.

IV

SUBSECTION (B) AS THE ONLY REALISTIC SAFEGUARD OF POLITICAL INDEPENDENCE

Finally, subsection (b) is narrowly tailored to satisfy California's compelling interest in freedom from party influence. Applying the lessons of history and experience, the state of California has focused its restriction on the organizations central to the political influence that has caused such disruption in its past. The majority, however, claims that less drastic means could be employed to further the goals of nonpartisanship. It relies on the district court's finding that

> the State could adequately safeguard the interests § 6(b) was designed to protect by less drastic means, including provision for nonpartisan methods of nominating candidates for local and judicial offices and controls on partisan activities of the candidates.

Majority op. at 285.

The majority's analysis confuses preservation of the *appearance* of political independence with avoiding the actual lure of party influence. As Justice Rymer notes: "The 'less drastic' possibilities posited by the district court may be links in the chain, *but cannot serve the states' structural interest if there is any missing link.* Rymer dissent at 301 (emphasis added). Justice Christian's declaration demonstrates that party endorsement of nonpartisan candidates, in and of itself, would create a legitimate threat to the entire nonpartisan framework. The majority's proposed less drastic means are thus missing the one link that would actually shield nonpartisan candidates from party influence.

In the same coin you shall pay me back.
Goeth's Faust 58 (L. MacNeice trans.1951).

Indeed, it is hard to imagine any more narrowly drawn restriction that would adequately serve California's compelling state interest in the integrity of judges and local officials. "[A] state need not choose a rule so much less restrictive that it also is useless in achieving the state's purposes." *Stevenson v. State Bd. of Elections,* 794 F.2d 1176, 1180 (7th Cir.1986) (Easterbrook, J. concurring); *see also Storer v. Brown,* 415 U.S. 724, 736, 94 S.Ct. 1274, 1282, 39 L.Ed.2d 714 (1974) ("[T]he Constitution does not require the states to choose ineffectual means to achieve its aims.") When one considers the uncontroverted reality of party power in California's history, it becomes clear that subsection (b) *is* narrowly drawn. As Judge Trott noted:

> [Subsection (b)] is limited in its coverage only to those concentrations of power that pose the greatest threat to the objectives of nonpartisanism. All other groups, individuals, and associations are free to do as they please. This protects the free expression and interchange of ideas that the First Amendment is designed to promote. . . .
>
> In addition, article II, § 6(b) is not a law *aimed* at ideas themselves or specific information that California wishes to suppress although concededly it has this "indirect consequence." As such, it compares favorably with the statute at issue in *Eu,* 109 S.Ct. at 1016. It is a marginal and workable restriction on speech incident to a set of election rules designed to promote independence in public office.
>
> Thus, section 6(b) is not the kind of substantial limitation or draconian restriction on free political exchange that rises to the level of incompatibility with the Constitution.

880 F.2d at 1080-81. Because it is the *only* means by which California can avoid political litmus tests for judges and local officials, and thereby ensure the independence that is the goal of nonpartisanism, I belive that subsection (b) is sufficiently narrowly tailored to survive constitutional scrutiny.

Justice Blackmun has noted that "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation." *Illinois State Bd. of Elections v. Socialist Workers*

Party, 440 U.S. 173, 188, 99 S.Ct. 983, 992, 59 L.Ed.2d 230 (1979) (Blackmun, J., concurring). The majority offers California two watered-down and ineffective alternatives to the only practical means of ensuring political independence. I recognize California's compelling interest in avoiding party influence over nonpartisan candidates and, like Judge Trott, I "do not deem it prudent for the Federal judiciary to conclude without the benefit of the legislative process" that California can adequately safeguard its interests by other means. 880 F.2d at 1080.

I would reverse the district courts's order granting summary judgment. The uncontradicted record demonstrates that California has a compelling interest in maintaining the integrity and independence of its local officials by precluding party endorsement in its nonpartisan elections.

Appendix B

Bob GEARY, Robert Silvestri, Dennis Mark, Melissa Gundrun, Wayne Johnson, David Soule, Max Woods, Peter Johnson, Robert Gebert, Election Action, Terence Faulkner, and Sudi Trippet, Plaintiffs-Appellees,

v.

Louise RENNE, San Francisco City Attorney, Dianne Feinstein, San Francisco Mayor, Board of Supervisors, City and County of San Francisco, City and County of San Francisco, and Jay Patterson, San Francisco Registrar of Voters, Defendants-Appellants.

No. 88-2875.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 16, 1988.

Decided July 24, 1989.

Appeal from the United States District Court for the Northern District of California.

Before SNEED, CANBY AND TROTT, Circuit Judges.

TROTT, Circuit Judge:

On June 3, 1986, the people of California amended their constitution to add the following provision as article II, § 6(b):

> No political party or party central committee may endorse, support or oppose a candidate for nonpartisan office.[1]

---

[1] Section 35 of the California Elections Code defines "political party" to include those parties that have qualified for the state's primary ballot: the Democratic Party (Cal. Elections Code §§ 8500-8945), the Republican Party (Cal. Elections Code §§ 9000-9510), the American Independent Party (Cal. Elections Code §§ 9600-9745), and the Peace and Freedom Party (Cal. Elections Code §§ 9750-9855). Plaintiffs-appellees argue that Article II, § 6(b) covers all political parties, not just those that are ballot qualified. We disagree, but even if we were to accept this contention, our analysis of the issues in this case would be the same.

In this appeal, we are asked to decide (1) whether this provision is compatible with First Amendment rights of free speech and association, and (2) whether it deprives the individuals and political entities to which it applies of equal protection of the laws as guaranteed by the Fourteenth Amendment. We hold on both counts that the provision is consonant with the United States Constitution, and in so doing we reverse the judgment of the district court.

I

Plaintiffs-appellees in this case are ten registered voters of the City and County of San Francisco, an organization of registered voters, and an officer of that organization. The basis of their complaint as it relates to this appeal was the refusal of defendants-appellants, the City and County of San Francisco and the San Francisco Registrar of Voters, to permit official political party and party central committee endorsements of candidates for nonpartisan offices to be printed in the San Francisco Voter Pamphlet in connection with elections scheduled for June 2 and November 3, 1987. Defendants-appellants based their refusal to print party endorsements on the language of article II, § 6(b).

Plaintiffs-appellees alleged that article II, § 6(b) violates the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1983 and 1985. In particular, they claimed that this provision of California's Constitution abridges their individual and collective rights of free speech and association and denies them equal protection under the law. The district court partially granted plaintiffs' motion for summary judgment and entered judgment on their behalf.[2] 708 F.Supp. 278.

---

[2] In its Order Partially Granting Plaintiffs' Motion for Summary Judgment and Directing Entry of a Final Judgment, the district court made the following statements:

> While the State of California may have a legitimate interest in maintaining the nonpartisan character of local, judicial, and school elections, Article II, Section 6(b) of the California Constitution is not a narrowly drafted enactment designed to advance such interest by the least drastic means. On the contrary, California can adequately safeguard such interests by providing for nonpartisan methods of nomination of candidates for such offices and by controlling partisan activities of the candidates—for example, by prohibiting candidates for such offices from soliciting or collecting campaign funds from political parties. Indeed, it appears that California has already taken steps in this direction by adopting nonpartisan nomination methods for all local, school, and judicial offices. See e.g. Cal.Elec.Code Secs. 6400 et seq., 22600 et seq., and 23500 et seq.; Cal. Const., Art. VI, Sec. 16; San Francisco Charter Secs. 9.100-1 and 9.104.
>
> Furthermore, defendants have not made any showing why California has a compelling interest in suppressing endorsements or discussion of candidates for local, school and judicial offices, by political parties and their central committees, but permitting such advocacy and endorsements by other groups, including partisan organizations and special interest groups.

The City of San Francisco then moved to vacate the court's judgment.[3] On June 9, 1988, the district court denied the motion, and this expedited appeal followed. We have jurisdiction under 28 U.S.C. § 1291, and we review *de novo* the grant of summary judgment. *See Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir.1986).

II

Subsection (b) of article II, § 6 represents a direct response of the people of California to a 1984 decision of their Supreme Court, *Unger v. Superior Court*, 37 Cal.3d 612, 692 P.2d 238, 209 Cal.Rptr. 474 (1984). (*Unger*). At the time *Unger* was decided, article II, § 6 read simply: "Judicial, school, county and city offices shall be nonpartisan."[4] "Nonpartisan offices" were—and still are—defined as "offices[s] for which no party may nominate a candidate." Cal. Elections Code § 37. The issue before the court in *Unger* was whether this provision barred the Republican Party from endorsing the "nonconfirmation" of the three justices in the

---

[3] By order of this court filed on September 21, 1988, the judgment of the district court was stayed pending further order of this court.

[4] As part of the ballot proposition that added § 6(b) to the California Constitution, § 6 was renumbered as § 6(a) and the word "all" was added as a qualifier to the offices described therein.

1982 General Election.[5] In an opinion in which four justices, including the current Chief Justice, wrote separately, a divided *Unger* Court held that article II, § 6, as it then read, did not prohibit a political party or its governing body from "endorsing, supporting or opposing candidates for nonpartisan office." *Unger,* 37 Cal.3d at 615, 692 P.2d at 240, 209 Cal.Rptr. at 476.[6] Justice Sims in dissent, wrote a lengthy opinion in which he meticulously surveyed the historical background of California's nonpartisan political traditions. He also discussed at length the First Amendment implications of this issue, as did Acting Justice Grodin in a separate concurrence.

In 1986, Assemblyman Richard Mountjoy, a member of the California Assembly since 1978, sought to reverse the effect of *Unger* by introducing Assembly Constitutional Amendment 7. This amendment proposed adding subsection (b) to article II, § 6. After successfully wending its way through the legislative process as provided in article XVIII, §§ 1 and 4 of California's Constitution, this remedial proposal was submitted to the people as Proposition 49 on the June 1986 ballot. The voters approved it by a vote of 2,292,678 to 1,805,305.[7]

---

[5] For a detailed study of events and controversy attending recent confirmation elections of the Justices of the California Supreme Court, *see* Uelman, *California Judicial Retention Elections,* 28 Santa Clara L.Rev. 333 (1988).

[6] Although the general election of November 1982 with which this lawsuit was concerned had already taken place by the time of the California Supreme Court's decision in *Unger,* the Court decided the case in any event, noting with considerable clairvoyance that "the issues raised are of general public interest and will likely recur in future elections." We note that the controversy over partisan involvement in elections continues unabated, this lawsuit being but one example.

[7] Of the 58 counties in California, Proposition 49 carried in 55. The three counties in which it failed to carry were Alameda, Los Angeles and San Francisco. The overall percentage of the vote was 55.9% for; 44.1% against. Statement of Vote, June 3, 1986 Primary Election (on file at U.S. Circuit Court Library, San Francisco, California).

III

To evaluate a constitutional challenge to an election law, we must first consider the character and magnitude of the injury to First Amendment rights allegedly presented by the law. *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983) (*Anderson*). We then determine whether or not the interests cited by the state to justify this injury are compelling and the "extent to which [they make] it necessary to burden the plaintiff's rights." *Anderson,* 460 U.S. at 789, 103 S.Ct. at 1570, *Eu v. San Francisco County Democratic Central Committee,* ___ U.S. ___, 109 S.Ct. 1013, 1019, 103 L.Ed.2d 271 (1989), *aff'g* 826 F.2d 814 (9th Cir.1989) (citations omitted (*Eu*). Finally, we must establish whether the law in question is narrowly tailored to serve the specified interest. *Id.*

This method of analyzing the proper judicial response to a constitutional challenge to an election law is useful in helping us to identify the constitutional and policy considerations that compete in such cases. Application of this method does not, however, automatically produce a decision. In the end, there is "'no substitute for the hard judgments that must be made.'" *Anderson,* 460 U.S. at 789, 103 S.Ct. at 1570 (citation omitted). We do not wish to pretend that our common sense and experience have no influence on our attempt to balance First Amendment and state interest considerations in the context of section 6(b).

IV

There can be no doubt that article II, § 6(b) constitutes a substantial limitation on the First Amendment rights of party members both to associate and to speak publicly and collectively regarding the qualifications of persons running for significant public offices. Political expression, in general, and speech uttered during a campaign for political office, in particular, enjoy the broadest protection of the First Amendment. *See Eu,* 109 S.Ct. at 1020; *Buckley v. Valeo,* 424 U.S. 1, 14, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976) *(Buckley)*. Moreover, "any interference with the freedom of a [political] party is simultaneously an interference with the freedom of its adherents." *Sweezy v. New*

Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1211, 1 L.Ed.2d 1311 (1957) *(Sweezy); Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 215, 107 S.Ct. 544, 549, 93 L.Ed.2d 514 (1986) *(Tashjian); Eu,* 109 S.Ct. at 1016; *see also NAACP v. Button,* 371 U.S. 415, 438-39, 83 S.Ct. 328, 340-41, 9 L.Ed.2d 405 (1963). These rulings apply to state laws through the Fourteenth Amendment. *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

Section 6(b)'s prohibition against party support for or opposition to a nonpartisan candidate also raises First Amendment concerns. The Court has held that conduct and communication are essentially indistinguishable in this context. *See Buckley,* 424 U.S. at 19, 96 S.Ct. at 634 ("[A] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quality of expression by restructuring the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

Insofar as article II, § 6(b) limits political expression and association, it imposes a type of restriction whose constitutionality is suspect. We must therefore examine Section 6(b) with exacting scrutiny as we seek to determine whether on balance it is compatible with First Amendment values. *Eu,* 109 S.Ct. at 1020-21; *Brown v. Hartlage,* 456 U.S. 45, 52-53, 102 S.Ct. 1523, 1528-29, 71 L.Ed.2d 732 (1982) *(Brown).*

Despite the fact that section 6(b) limits highly protected expression, four factors mitigate its offensiveness to the Constitution. These redeeming features of section 6(b) are as follows:

(1) It expands rather than constricts the political process, avoiding a concentration of power in the dominant political parties.

(2) It applies only to a limited number of organizations, leaving individuals and an unlimited number of other groups,

ad hoc or otherwise, to speak, endorse, or support as they please.

(3) It pertains to carefully selected intrastate nonpartisan offices, not offices of national scope.

(4) Its limitation on First Amendment activities compares favorably with other similar restrictions previously approved by the Supreme Court.

We discuss each of these features in turn.

1. Section 6(b) Expands the Political Process

We take the view that a restriction on political speech such as section 6(b), whose dominant effect is to open the process to more diverse interests, groups, and individuals, or to prevent the political process from becoming clogged and unworkable, inflicts a less severe injury on peoples' First Amendment rights than does a restriction that leads to a concentration of political power. This view finds ample support in Supreme Court opinions. Those cases striking down restrictions on political expression often base their decisions on the need for an open political process that will accommodate a variety of groups and interests. In *Anderson,* for example, the Court justified its decision to strike down Ohio's early filing deadline for statements of candidacy on the grounds that it unfairly burdened new or small political parties and independent candidates. *See* 460 U.S. at 789, 103 S.Ct. at 1570 ("By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically, political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream.") (citations omitted); *see also Storer v. Brown,* 415 U.S. 724, 729, 94 S.Ct. 1274, 1278, 39 L.Ed.2d 714 (1974) (warning against regulations that "confer an effective political monopoly on the two major political parties") *(Storer), Sweezy,* 354 U.S. at 251, 77 S.Ct. at 1212 ("All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority,

dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted.").

By contrast, in cases that uphold the constitutionality of restrictions on political expression the Court often grounds its judgments on the fact that the limitation does *not* restrict access to the political arena, or is necessary to preserve the integrity of the electoral process. In *Jenness v. Fortson,* for example, the Court upheld the constitutionality of Georgia's filing deadlines because "[u]nlike Ohio's [Georgia's election laws] do not operate to freeze the political status quo." 403 U.S. 431, 438-39, 91 S.Ct. 1970, 1974-75, 29 L.Ed.2d 554 (1971) (*Jenness*); *see also Storer,* 415 U.S. at 730-33, 94 S.Ct. at 1279-80 ("The requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of various routes to the ballot. It involves no discrimination against independents.").

In a sense, section 6(b) simply prevents political parties as such from dominating an area designed to remain open to everyone. It promotes the vitality and fluidity of the political process rather than setting it in concrete. Section 6(b) is the type of law the Court regarded favorably in *Anderson* and *Sweezy*. This interpretation of section 6(b) depends, of course, on the legitimacy of the judgment endorsed by California's electorate that permitting partisan political parties, with all their wealth, power, and expertise, to move into the non-partisan arena necessarily operates to restrict the room that is now available there to members of nonqualified parties and candidates who are truly independent. We will discuss this judgment, and its basis in California's history, later in this opinion.

2. Section 6(b) Does Not Unnecessarily Restrict Political Debate

The magnitude of the injury imposed by section 6(b) is diminished by the fact that this provision governs the activities of organizations, not individuals: It keeps no natural person in California from the ballot, and it prevents no such person from supporting, endorsing, opposing, or voting for the candidate of his

or her choice. *Sweezy,* 354 U.S. at 250, 77 S.Ct. at 1211, *Tashjian,* 479 U.S. at 215, 107 S.Ct. at 549, and *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1987)[8] notwithstanding, we see this as an important distinction in analyzing the character and magnitude of the assessed injury in this case. The distinction both ameliorates the character and diminishes the magnitude of the injury under examination. Any member of any political party or central committee in California, or any group of members (ad hoc or otherwise), is free to endorse, support, or oppose any candidate for nonpartisan office so long as the individual or group does not purport to speak or act for the party. Similarly, any such individual may run for any of the nonpartisan offices in question, even though he himself is closely identified with a political party or even the chairman of its central committee. In addition, and importantly, article II, § 6(b) does not "censor[ ]the political speech a party shares with its [own] members," "prevent[ ]party government bodies from stating whether a [partisan] candidate adheres to the tenets of the party . . . " "[n]or hamstring[ ]voters seeking to inform themselves about the [party's] candidates and the campaign issues." *Eu,* 109 S.Ct. at 1020. We see these points as major distinctions between this case and *Eu*. In sum, we do not see Section 6(b)'s impact on political debate as draconian.

---

[8] In *First National Bank of Boston v. Bellotti,* the Court observed that "[t]he court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular serves significant societal interests. The proper question therefore is not whether corporations "have" rights and, if so, whether they are coextensive with those of natural persons. Instead, the questions must be whether [the limitation complained of] abridges expression that the First Amendment was meant to protect." 435 U.S. at 775-76, 98 S.Ct. at 1415-16. We accept this guidance in assessing the character of the asserted injury in this case, but we believe that in this context it does not prevent us from making the distinctions that we have.

3. Section 6(b) Concerns Only Intrastate Nonpartisan Offices

The weightiness of section 6(b)'s infringment on free speech on the scale of constitutional injuries is also lessened by the character of the elections and offices that fall with its scope. The elections to which section 6(b) applies are statewide or local elections. The winners of section 6(b) contests do not generally travel to Washington, D.C. or the national party conventions—they tend to stay at home and contend with the problems of their respective states or municipalities. In *Anderson,* the Court found the state's interest in regulating matters of statewide or local interest to be more compelling than its interest in regulating national elections. 460 U.S. at 795, 103 S.Ct at 1573 ("[T]he State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the state's boundaries. . . . The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.") *See also Cousins v. Wigoda,* 419 U.S. 477, 483, 95 S.Ct. 541, 545, 42 L.Ed.2d 595 (1975) ("[c]onsideration of the special function of delegates to . . . a [National Party] Convention militates persuasively against the conclusion that the asserted interest constitutes a compelling state interest."). Moreover, our Constitution reflects the judgment that it is important to exempt judges from the sphere of political influence. *See* U.S. Const., article II, § 2 and article III, § 1. We see no reason why this proposition should not apply to state judges with equal force. Although these observations—including the priority we afford to removing judicial decisions from political influence—go primarily to the compelling interest of the state test, they are also relevant to the character and magnitude of the asserted injury.

4. Section 6(b) Compares Favorably With Similar First Amendment Restrictions

The asserted injury that section 6(b) inflicts on freedom of speech stands in favorable contrast to other injuries to fundamental First Amendment activities that the courts have sanctioned over the years. For example, section 6(b)'s limitation on individu-

als' First Amendment rights is less severe than those imposed by restrictions on the political activities of federal employees that the Court has upheld. *See CSC v. Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 2882, 37 L.Ed.2d 796 (1973) (approving the constitutionality of 5 U.S.C. § 7324(a)(2)) (the Hatch Act), which prevents many thousands of federal employees from holding a party office, working at the polls, acting as a party paymasters, politicking for a partisan candidate, raising funds for a partisan candidate or political party, managing the partisan candidate campaign, serving as delegates to a party convention, etc.) (*Letter Carriers*).[9] And, on the same day it decided *Letter Carriers,* the Court approved, over similar First Amendment objections, the Oklahoma Merit System of Personnel Administration Act which includes as section 818, paragraph 7, an extremely harsh prohibition against personal speech, association, and other political activity. *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Section 818, paragraph 7, states:

> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member *of a partisan political club,* or a candidate for nomination or election to any paid public office, *or shall take part in the management or affairs* of any political party *or* in

---

[9] The office of the Special Counsel, U.S. Merit Systems Protection Board issues a booklet to federal employees listing the dos and don'ts of political activity. We note that it was distributed to all federal judges on September 16, 1988, with a copy of the following resolution adopted at its September 1943 session by the Judicial Conference of the United States:

> "Whereas with rare exceptions the officers and employees of the Federal courts have kept free from political activities during their terms of service, but it seems desirable to guard against deviations from this course, and for that purpose to recommend a standard: Therefore be it resolved, that it is the sense of the Judicial Conference that it is incompatible with the proper service of the federal judiciary for its officers or employees to become candidates for political office or participate in other political activities of a kind forbidden to employees of the executive branch of the government by the Hatch Act (18 U.S.C. 61h)."

any political campaign, except to exercise his right as a citizen *personally* to express his opinion and to cast his vote."

Okla.Stat.Ann. Tit. 74 § 818 (1965) (Emphasis supplied).

Section 6(b) is also more hospitable to First Amendment concerns than the result in *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973) (*Rosario*) which permits a state to deny altogether a person's right to vote in the primary election unless enrolled in that party "approximately eight months prior to a presidential primary . . . and eleven months prior to a nonpresidential primary." The holding in *Rosario* is particularly striking when read in the light of the Supreme Court's previous holdings to the effect that voting is of the most fundamental significance under our constitutional structure. *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 534, 11 L.Ed.2d 481 (1964); *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964) (voting is " 'a fundamental political right . . . preservative of all rights.' ")

In addition, section 6(b)'s limitation is less severe than the "sore-loser" restriction approved in *Storer*, 415 U.S. at 730, 94 S.Ct. at 1279, and it contrasts favorably also with *Jenness*, 403 U.S. at 438, 91 S.Ct. at 1974, which, in the interest of maintaining manageable ballots, permits a state to keep the name of an independent candidate for office off a ballot unless the candidate is able to secure a nominating petition signed by a certain number of qualified electors. Article II, § 6(b) also appears less onerous than the practice—under the banner of "appropriate regulation" —of refusing to permit a political party as such to have any access whatsoever to the ballot because it failed to garner a sufficient number of votes in the previous election. *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974). Moreover, California's regulation is less harsh than other constitutionally acceptable regulations that flatly deny a candidate's access to a ballot unless the candidate can demonstrate the seriousness of his candidacy, *see Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d (1972), or unless the candidate satisfies a 7-year durational residency requirement, *see Chimento v. Stark*, 414 U.S. 802, 94 S.Ct. 125, 38 L.Ed.2d 39 (1973), *summarily aff'g* 353 F.Supp. 1211 (D.N.H.).

On the other hand, article II, § 6(b) appears to be more far-reaching than—or at least on a par with—Kentucky's restriction on certain speech by candidates for office which was disapproved in *Brown*, 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982). In that case, the Supreme Court struck down restrictions as to what campaigning candidates could promise to the voters in connection with the salaries of the offices for which they were running. Relying on *Mills v. Alabama*, 384 U.S. 214, 218-19, 86 S.Ct. 1434, 1436-37, 16 L.Ed.2d 484 (1966), for the proposition that ". . . there is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs . . . ," the Court issued a strong caution against restricting the offer of ideas by a *candidate* to the voters. *Brown*, 456 U.S. at 52, 102 S.Ct. at 1528. Section 6(b) contains no such restrictions. And, the provision under scrutiny here shares certain identifiable characteristics with the limitation on speech and association tested and found wanting in *Eu*. In that case, the Supreme Court struck down provisions of the California Election Code forbidding the official governing bodies of political parties from endorsing candidates in their *own* party primaries. *Eu*, 109 S.Ct. at 1025. As indicated, however, we believe that the First Amendment injuries in *Eu*, although similar in some important aspects to the injuries in this case, are quite dissimilar in others, and that the interests advanced in the two cases are distinguishable.

V

California law has consistently reflected the judgment that it is in the state's interest to designate judicial, school, county, and city offices as nonpartisan.[10] By definition, a nonpartisan office is an

[10] In 1913, California passed a statute providing that: "[i]n the case of a nomination paper for any candidate for a judicial office, school office, county office, or township office, the provisions of this subdivision shall apply *except that no such nomination paper nor any section thereof shall contain the name of any political party, or any signer thereto, nor shall the candidate be referred to as a candidate for the nomination of any party.*" *See Unger*, 37 Cal.3d at 633, 692 P.2d at 253, 209 Cal.Rptr. at 489 (emphasis added) (citation omitted) (Sims, J., dissenting). The

office that is independent from partisan politics. By California law, a nonpartisan office is an office whose occupants have neither been nominated nor endorsed, supported, or opposed by a political party.[11] *See* Cal. Elections Code § 37; Cal. Const. art. II, § 6(b). Section 6(b) thus represents a particular means of attempting to ensure that nonpartisan offices are nonpartisan in fact as well as in name.[12]

---

prohibition on nomination of candidates for these offices by political parties was incorporated into article II, § 2¾ of California's Constitution in 1926. Article II, § 2¾ became article II, § 6 in 1976, and was redesignated as article II, § 6(b) in 1984 with the passage of Proposition 49.

[11] The restrictions on nomination and endorsement are the basic laws giving shape to nonpartisan offices in California. We note, however, that California law also prohibits the appearance on the ballot itself of party affiliation of a candidate and requires that partisan and nonpartisan contests be listed separately when presented to the voters in the voting booth. *See* Cal. Elections Code §§ 10200.5, 10207.

[12] Other states have chosen a variety of means of attempting to preserve the independent character of judicial and other nonpartisan elections. Colorado, Indiana, and Missouri prohibit judges from campaigning for any political party. Colo. Const. art. VI, § 18; Ind. Const. art. 7, § 11; Mo. Const. art. 5, § 25(f). Florida prohibits judicial candidates from campaigning as a member of a political party or from accepting funds from political parties. Fla.Stat.Ann. § 105.071. (West Supp.1988). Florida also prohibits political parties from endorsing, supporting or assisting in judicial campaigns. Fla.Stat.Ann. § 105.09 (West 1982). Georgia prohibits political parties from nominating judges in nonpartisan elections. Ga. Code Ann. § 34-1016.1 (Supp.1988). Louisiana prohibits its Educational Television Authority from supporting or opposing any political candidate. La.Rev.Stat. Ann. § 17:2506 (West 1982). Mississippi prohibits judges in primary elections from aligning themselves with any other candidate or faction within his party. Miss. Code Ann. § 23-15-973 (Supp.1987). Montana prohibits nonpartisan candidates from indicating their political affiliation in their declarations for nomination. Mont. Code Ann. § 13-14-112 (1987). The state also prohibits political parties from endorsing or contributing to the campaign of judicial candidates and justices of the peace. Mont. Code Ann. §§ 13-35-231, 3-10-201(4) (1987). New Jersey prohibits political parties from endorsing candidates before the primary elections. N.J. Rev.Stat. § 19:34-52 (1964). Thus, party screening committees are prohibited. *Cavanagh v. Morris County Democratic Comm.*, 121 N.J.Super. 430, 297 A.2d 594 (Ch.Div.1972). However, individuals may express their support for a candidate even though they are party officials. *Gillen v. Sheil*, 174 N.J.Super. 386, 416 A.2d 935 (Law Div.1980). North Dakota prohibits candidates from identifying their party affiliation in any nominating petition for county offices, judges, and two executive positions. N.D.Cent. Code § 16.1-11-08 (Supp.1987). Section 16.1-11-37 (Supp.1987) also prohibits partisan nominations for these offices. Section 40-21-06 (1968) prohibits candidates for municipal offices from identifying their party affiliation in their nominating petition. The North Dakota political Supreme Court has ruled that these statutes do not prohibit political parties from issuing resolutions or "other forms of support." *Haggard v. Meier*, 368 N.W.2d 539 (N.D.1985). Oklahoma prohibits candidates for judicial offices from making his party affiliation public. Okla.Stat.Ann. tit. 20, § 1404.1 (Supp.1988). Oregon prohibits candidates for nonpartisan office from campaigning as members of a political party. Or.Rev.Stat. § 249.015 (1986). The Oregon Attorney General has ruled that this statute prevents candidates from indicating the party the candidate represented in the legislature. 36 Op.Ore. Att'y Gen. 55 (1972). South Dakota prohibits parties from endorsing or nominating judicial candidates. S.D. Codified Laws Ann. § 12-9-2 (1982). And Wyoming prohibits parties from contributing to any candidate in its primary election. Wyo.Stat. § 22-25-104 (1977).

California's interest in section (b) may therefore be identified with its interest in the impartial administration of government. Defendants-appellants state that by prohibiting political parties from supporting, endorsing, or opposing candidates for nonpartisan office, California wishes to ensure that the officials elected will be accountable to the voters rather than to the parties. Mayor Bradley of Los Angeles also links section 6(b) with the effort to make government responsive and responsible to the people as a whole. In his amicus brief in support of defendants-appellees, Mayor Bradley asserts: "[P]ermitting political parties to endorse candidates for local elections will result in undue partisan influence and control over those officials; it will undermine their independence to solve problems faced by local government and will threaten the fair and impartial administration of the law." Significantly, Mayor Bradley perceives the threat party endorse-

ments pose to the independence of nonpartisan officials not as "the impact that endorsements may have on voters' choices but rather [their] indirect impact on elected officials' independence from partisan political pressures."[13] As the holder of a nonpartisan office as well as a former partisan candidate for governor of California and a leader of his party, Mayor Bradley brings considerable relevant experience to assessing the need for section 6(b).

Supreme Court case law and the Constitution require the conclusion that California has a compelling interest in seeking to promote fair government and minimize the sort of "undue partisan influence and control" Mayor Bradley describes. In *Letter Carriers*, for example, the Court found the Hatch Act's restrictions on the political activities of government employees to be justified by "this great end of government—the impartial execution of the laws." 413 U.S. at 565, 93 S.Ct. at 2890. In support of this conclusion, the Court wrote:

> [I]t is essential that federal employees not, for example, take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns and not run for office on partisan political tickets. Forbidding activities like

---

[13] Judge Canby asserts in his dissent that our concern is with the effect of political endorsement on the voters, not on the candidates. As our reliance on Mayor Bradley's statement suggests, Judge Canby is incorrect. To imply that nonpartisan candidates might not feel compelled to seek party endorsements is to ignore the structure of our political system. Our system is fundamentally a two-party system in which association with the Democratic or Republican party makes it possible for a candidate to call on pre-existing support for that party and the party's organizational backing. As long as this system is in place, nonpartisan candidates will find it desirable to obtain party support. Our concern is with the pressure party endorsements put on nonpartisan candidates to adopt views acceptable to a major party, and not, as Judge Canby states, with the possibility that voters would attach "the wrong meaning" to the party's endorsement. We see section 6(b) as making it possible for nonpartisan candidates not to be beholden to political parties rather than as a means of keeping information from the voters.

> these will reduce the hazards to fair and effective government. . . .
>
> There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representing Government is not to be eroded to a disastrous extent.
>
> Another major concern of the restriction against partisan activities by federal employees was perhaps the immediate occasion for enactment of the Hatch Act in 1939. That was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine. The experience of the 1936 and 1938 campaigns convinced Congress that these dangers were sufficiently real that substantial barriers should be raised against the party in power—or the party out of power, for that matter—using the thousands or hundreds of thousands of federal employees, paid for at public expense, to main its political structure and political campaigns. . . .
>
> A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs. . . . It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee from attempting to influence or coerce another.

413 U.S. at 565-66, 93 S.Ct. at 2890-91.

And, in dealing with an equal protection challenge to a provision of the constitution of Texas prohibiting certain officers from

running for the state legislature during their terms in office, the Supreme Court spoke of the potential of politics to divert an office holder's attention from the duties of his elected position:

> By prohibiting candidacy for the legislature until completion of one's term of office, § 19 seeks to ensure that a Justice of the Peace will neither abuse his position nor neglect his duties because of his aspirations for higher office. The demands of a political campaign may tempt a Justice of the Peace to devote less than his full time and energies to the responsibilities of his office. A campaigning Justice of the Peace might be tempted to render decisions and take actions that might serve more to further his political ambitions than the responsibilities of his office. The State's interests are especially important with regard to judicial officers. It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with regard to the views of his constituents.

Clements v. Fashing, 457 U.S. 957, 968, 102 S.Ct. 2836, 2846, 73 L.Ed.2d 508 (1982). *See also Elrod v. Burns*, 427 U.S. 347, 368, 96 S.Ct. 2673, 2687, 49 L.Ed.2d 547 (1976).

We can find no authority whatsoever for the proposition that a state or a government entity does not have a compelling interest in having its officer discharge with fidelity to the public interest the duties for which they are responsible. That California's interest are compelling in this regard seems nothing less than obvious, and the district court so held.[14] We also believe that this interest is at least equal—if not greater than—other acknowledged legitimate interests, such as protecting the integrity of the political process from frivolous or fraudulent candidacies, efficiency in the election process, avoiding voter confusion caused by too many candidates on the ballot, and avoiding the expense and burden of run-off elections.

[14] It is this conclusion that most distinguishes this case from *Eu* in which the Supreme Court was unable to find a compelling governmental interest in telling parties how to conduct their internal affairs. 109 S.Ct. at 1022.

Moreover, the Constitution reflects the judgment that the government has a compelling interest in removing the federal judiciary from the danger of political influence. *See* U.S. Const., article III, § 1 (providing that federal judges are to be appointed for life and are not to have their compensation diminished). Amplifying on the view of the judiciary that underlies this provision, the Court has stated:

> [T]here rests upon every federal judge affected nothing less than a duty to withstand any attempt . . . to diminish this compensation, not for his private advantage—which, if that were all, he might willingly forgo—but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guarantee of an independent judicial administration for the benefit of the whole people.

O'Donoghue v. U.S., 289 U.S. 516, 533, 53 S.Ct. 740, 744, 77 L.Ed. 1356 (1933). And Judge Irving R. Kaufman of the Second Circuit has pointed out that "one of the grievances against George III listed in the Declaration of Independence had been that: 'He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries! Our Founding Fathers were determined that the judiciary of the new republic would not be so feeble.' "[15]

The reasons behind the existence in our Constitution of these aspects of articles II and III are identical to the interests advanced by Mayor Bradley in support of article II, § 6(b). We do not think a meaningful distinction between state and federal judges can be made in this context. We recognize that section 6(b) applies to school boards and to all local officials, not just to the judiciary, but we believe the state has an equally compelling interest in regulating these offices. Chief Justice Burger has noted: "No simple tradition in public education is more deeply rooted than local control over the operation of schools; local

[15] Address by The Honorable Irving R. Kaufman, United States Court of Appeals for the Second Circuit, *Chilling Judicial Independence*. Thirty-Fourth Annual Benjamin N. Cardozo Lecture, delivered November 1, 1978, to the Association of the Bar of the City of New York.

autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42, 94 S.Ct. 3112, 3125-26, 41 L.Ed.2d 1069 (1974); *see also Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410, 97 S.Ct. 2766, 2770, 53 L.Ed.2d 851 (1977) ("[Local authority in educational matters is a] vital national tradition.") (citations omitted). The other offices covered by section 6(b), offices such as mayor, city council member, county tax assessor, county supervisor, and district attorney, may not have received as much judicial attention as public education, but they belong as squarely within the realm of state as opposed to federal concerns. The state's strong interest in regulating matters of local importance thus serves to make section 6(b) in its entirety a matter of compelling state interest.[16]

VI

We now confront the question of whether the means chosen by California to safeguard this compelling interest are overbroad. As noted above, section 6(b) represents an attempt to make nonpartisanship more than a matter of nomenclature. It expresses the judgment that simply designating an office "nonpartisan" is not sufficient to ensure its political independence, that if those who hold nonpartisan office are to be truly impartial, burdened not by partisan commitments but only by civic responsibility, political parties must be barred from active participation in the nonpartisan electoral process. This judgment is California's judgment, and it is rooted in California's history. We therefore turn to that history in an effort to understand why California has felt it necessary to insulate the process of electing judicial, school, county and city officials from the realm of partisan politics.[17]

---

[16] We note that, nationwide, close to seventy percent of municipal elections are nonpartisan. Cassel, "The Nonpartisan Ballot in the U.S.," in *Electoral Laws and their Political Consequences* 226-27 (A. Grofman ed. 1986).

[17] Even as we feel compelled to assess the history of nonpartisanship in California politics, however, we are mindful of the warning of noted

Before beginning our discussion of the historical impetus for section 6(b), we note that our reliance on history finds support not only in the well-established principles of federalism, but also in the writings of Oliver Wendell Holmes. In his famous passage arguing that experience forms the life of the law, Holmes attests to the importance of considering a law in the context of the historical circumstances that gave rise to it:

> The life of the law has not been logic: It has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

O.W. Holmes, *The Common Law* 1 (1881).

We may trace the roots of nonpartisanship in California to a time when local government, including the judiciary and public school boards, appears to have been dominated by partisan political bodies which were largely under the thumb of aggressive special interests, including the Southern Pacific Railroad.[18] The

---

Constitutional authority Paul Freund: "When [a judge] looks to history for a scaling of values, he is confronted . . . with the problem of differentiating history from the historians: In Yeats' phrase, how to know the dancers from the dance; in Santayana's, looking over a crowd to find one's friends." Rational Decisions: Nomos VII, "Rationality in Judicial Decisions" 114.

[18] See *Unger v. Superior Court, supra,* for a review of the historical background of nonpartisan election laws in California. The development of this tradition is also extensively discussed in Lee, *The Politics of Nonpartisanship* (1960) and J. Owens, E. Costantini & L. Weschler, *California Politics and Parties* 78 (1970).

pernicious activity of the "Octopus," as the Southern Pacific Railroad was often called,[19] has been summarized as follows:

> The political machine fashioned by the Southern Pacific Railroad stands as the most successful, if the most corrupt, political organization in the history of California politics. The political organization created and controlled by California's premier railroad literally ran the state's politics. The railroad, started in 1861 by Theodore D. Judah, Leland Stanford, Collis P. Huntington, Mark Hopkins, and Charles Crocker, was the single most important economic power in the state until the Progressive reforms after 1910. The Big Four, as Stanford, Huntington, Hopkins, and Crocker were known after Judah's death in 1863, entered politics to expand and protect their holdings. Their lobbyists in Washington, D.C. were able to secure a total subsidy for the railroad amounting to $27,855,000 in federal bonds and ten million acres in public lands, thereby making the Southern Pacific the richest business and the largest private landowner in the state. Furthermore, vast sums were wrested from local government and the state in the 1860's, and although such subsidies were ended in 1871, the Southern Pacific Railroad already owned 85 per cent of the state's railways and dominated land transport in California.
>
> Local communities that refused to furnish the subsidies set by the Big Four were threatened with extinction by careful planning of the rail route to bypass them. Crocker, now famous for the art collection that bears his name, was even more famous for threatening the Los Angeles city council if they did not meet his demands; "If this be the spirit with which Los Angeles proposes to deal with the railroad upon which the town's very vitality must depend, I will make grass grow in the streets of your city."

---

[19] The term "Octopus" was coined by novelist Frank Norris in a book so entitled about events at Mussel Slough, the scene of a deadly gunfight that took place in California on May 11, 1880 between local settlers and railroad agents. *See* the Journal of the Ninth Judicial Circuit Historical Society, "Western Legal History," Vol. 1, No. 2, Summer/Fall 1988.

The Southern Pacific had an agent in every town and village to protect its interests. In time, both Los Angeles and San Francisco had resident political machines that were controlled by the railroad. Such machines were common throughout the nation, but the "Octopus," as the railroad was christened by novelist Frank Norris, was notorious in its open display of contempt for public morals and decency. It is not surprising that the Workingmen's party made the Southern Pacific a favorite target. Nor is it surprising to find that both the Democratic and Republican parties finally reacted to such blatant corruption. The federal government, not the state government, however, finally exposed the railroad machine. As a result of information brought out in a court case, Congress formed the Pacific Railway Commission in 1887 to examine federally subsidized railroads. Although Stanford and Crocker refused to cooperate, it became evident that considerable amounts of money were spent to influence federal and state legislation, and that the Southern Pacific dominated California politics through its business agents.

Even with the exposure provided by the federal investigations, state political leaders proved to be ineffectual in dealing with the "Octopus." The task of destroying the Southern Pacific machine fell to a group of political reformers and journalists. Led by John R. Haynes and Edward A. Dickson, an incipient organization was formed to battle the Los Angeles branch of the machine, and soon editors, writers and professional people throughout the state were joining the movement. Despite the efforts of these reformers, the Southern Pacific Railroad faced the twentieth century still the number one force in California politics. Its demise was yet to come.

California's frontier politics had disappeared by 1900. The free and easy style of the early years gave way to a sophisticated and ruthless political machine. It made little difference which party was in power, the railroad still ruled. Politicians either played the game according to Southern Pacific rules or soon found themselves out of office. Obviously the power of the railroad's political machine could be checked only by an

> organization of comparable power. Before the end of World War I, reformers created such an organization; an organization that not only defeated the railroad, but also shaped California's political heritage for many years.

J. Owens, E. Constantini, and L. Weschler, *California Politics and Parties.* 31-32 (1969) [hereinafter Owens].

The "Octopus" was not the only corrupt entity on the California scene. Local political machines were also a major problem:

> The most important of the civic reform movements took place in San Francisco, where muckraking newspapermen joined forces with business and professional groups to battle one of the most ruthless and graft-ridden city machines in the state. The Union Labor party, under the direction of Abraham Ruef, elected its own mayor, captured the police force, ran the franchise board as a private vending operation, and used utilities rates as a means of political payoff. After capturing city hall in 1901, Boss Ruef, through the mayor's office, began a five-year orgy of bribery, blackmail, and extortion. Reformers, thoroughly disgusted with party politics and stymied at the polls, turned to the courts. The ensuing graft prosecution, 1906-1909, provided the opponents of the San Francisco machine with the ammunition they needed to start a statewide campaign against political corruption.

Owens at 32.

The effect of such special interests and partisan groups on elected school boards and judges was of particular concern to the public. Turn-of-the-century history provides insight into the importance for impartial government of depoliticized education and a judiciary removed from political pressures.

In examining the historical development of California's—and indeed the nation's—tradition of depoliticized educational government at the local level, we find a turn-of-the-century history that reveals remarkable similarities to the political miasma for which the Octopuses and the Abe Ruefs of the time were responsible in other related areas. We draw knowledge and insight from R. Freeman Butts, noted historian of American education:

> The bureaucratic modernization of urban schools took several forms, each dependent on the particular political process that developed in different cities.
>
> The early city systems of education had reflected small town and rural arrangements in which a local community elected a school board whose members ran the schools in their spare time. Their duties were to appoint teachers, select textbooks, decide where schools should be located, fix teachers' salaries, and determine how much taxes should be raised. As the city systems grew in size and cities were divided into wards for electing city officials, the wards commonly became the school board districts. When immigrant groups poured into the cities, especially from the 1880s onward, the wards became centers of ethnic concentration so that elected official represented their ethnic constituencies. This had the merit of "keeping the schools close to the people of the local community" so that they could reflect the wishes of the people, but the danger was that the schools could easily become the special province of local political bosses. In fact, they *did* become patronage bases of ward leaders, whose wishes could determine whose daughter was appointed as teacher, or whose brother or cousin would become janitor, or who would be awarded the contract for school buildings, repair, maintenance, and supplies.
>
> The movement toward educational centralization was accelerated by sensational exposures in the press (in the Lincoln Steffens' muckraking genre of the day) of corruption and cronyism in the management of schools by local political bosses. With Jacob Riis and Joseph Mayer Rice leading the way, welfare-progressive reformers of a humanitarian bent were persuaded that the welfare of the children would be served by the "clean government" processes being proposed as other municipal and state reforms. Progressive reformers of an economy/business orientation were persuaded that the solution was to reduce the power of local political bosses by replacing the larger boards with smaller boards composed of more public- spirited citizens who would be elected at large or be appointed. Moreover, political cronyism would be

> eliminated by giving more power to professional administrators, who would establish a civil service type of personnel selection based on the criteria of merit and training, rather than on the kinship or personal relation criteria that evidently prevailed.

R.F. Butts, *Public Education in the United States: From Revolution to Reform* 177-178 (1978).

Writing in 1929, Dean Ellwood P. Cubberley of the Stanford School of Education wrote that "[n]o surer mean for perpetuating the personal and political evils in school control can be devised than the continuation of the ward system of representation." E. Cubberley, *Public School Administration* 175 (1929). Today it is estimated that in excess of seventy percent of "all American school districts provide for pure at-large and nonpartisan election of board members."[20] *See* Note, *The Voting Rights Act and Local School Boards: An Argument for Deference to Educational Policy in Remedies for Vote Dilution,* 67 Tex.L.Rev. 139, 170 (quoting from H. Zeigler, E. Kehoe & J. Reisman, *City Managers and School Superintendents: Responses to Community Conflict* 11 (1985)).

The tenor of late nineteenth century California regarding the effect of party politics on judges is well chronicled in the debates of California's Constitutional Convention of 1878-79. W.J. Tinnin, representative for the Third Congressional District, remarked:

> I have attended the conventions of the Democratic party, of the Independent party, and the Republican party; and what is the argument advanced therein in regard to judicial positions? Why, A already has the office, and the party owes him no more recompense; his fealty has been paid for; now give it to B, or some one else who has served the party. That argument

[20] For additional reading on the development of school boards in the United States, see Callahan, "The American Board of Education, 1789-1960" in *Understanding School Boards* 19—46 (P.J. Cistone ed. 1975), and Tyack, *The One Best System: A History of American Urban Education* (1974).

> invariably controls the convention, and you will find that those who have held the office are ousted to make room for others. Public clamor has its influence even upon Judges.

Uelman, *California Judicial Retention Elections,* 28 Santa Clara L.Rev. 333, 336 (1988) (citation omitted). And Horace C. Rolfe, representative for San Diego and San Bernadino Counties, observed:

> This idea of a justice of a Supreme Court being reelected in consequence of having been a good and efficient judge, is all a delusion. It never has happened in this State, and I do not believe it ever will happen. If a Justice of our Supreme Court is nominated for reelection, and happens to be on a ticket that wins, he is reelected. If he happens to be on the ticket in the minority, he is defeated. I have known some of our best Judges defeated because they were put up by a party that was slightly in the minority.

Id. (citation omitted).

To remedy the problem of party control over judges, three reforms were built over the years into California law. The first—staggered fixed year terms—appeared with California's second Constitution in 1878. The second—the designation of judicial offices as "nonpartisan"—occurred in 1911 as part of Hiram Johnson's package of reforms. The third—the abolition of contested elections for appellate justices in favor of incumbent retention elections—closed another gap in 1934.[21] Each of these measures emanated from a continuing effort to shelter the judiciary from politics with the objective of promoting excellence, integrity, and independence; and each grew out of real problems, not abstract musings of academics.

[21] Dean Uelman reports that the 1934 measure was the product of a statewide "good government" committee made up of civic leaders, veterans' groups, and law enforcement agencies. The committee was headed by District Attorney Earl Warren of Alameda County. Uelman, *California Judicial Retention Elections,* 28 Santa Clara L.Rev. at 339. *See also* Smith, *The California Method of Selecting Judges,* 3 Stan. L.Rev. 571, 579-80 (1951).

Although we have focused on measures aimed at removing school boards and the judiciary from partisan influence, we do not wish to suggest that turn-of-the-century Californians restricted their concern over political corruption to those areas. A more general reform movement had two prongs: one aimed at bringing the activities of partisan politics under control and the other designed to remove altogether certain areas of government from the partisan arena.

In 1916, one faction of victorious "reformers" are reported to have viewed in retrospect the political scene which they set out to clean up as follows:

> Under the provisions of our charter, as it existed prior to 1910, the following objectionable results obtained:
>
> 1. The selection of candidates for offices nominated by party conventions dictated to and controlled by political bosses.
>
> 2. A partisan rather than an efficient administration of municipal affairs.
>
> 3. The election to offices, by a minority vote, of candidates who did not represent the choice of a majority of the voters.
>
> It was for the correction of these evils that the charter was amended in 1910, and the present system of double election enacted. That the evils complained of were real and the need of correction imperative was at the time generally conceded, and is still conceded by all who have the welfare of the city at heart. The old municipal nominating conventions, like the county and state conventions, with their boss-chosen and boss-controlled delegates, had become intolerable; while partisan government based upon a so-called party responsibility was demonstrated to be but another name for boss rule applied to the administration of the office itself.
>
> The present system has effectually swept these two evils for all time into the political scrap basket, and this accomplishment must be accredited to it as a positive virtue.

Jordan, "Municipal Elections," XI Transaction of the Commonwealth Club of California 173, 179 (August 1916). This passage represents not a fanciful prediction of what would happen if partisan politics become involved in municipal government, but a vivid description of an actual unsatisfactory situation which, in the judgment of its author, had just been remedied.[22]

The reforms that characterized the Progressive Era were accompanied by a positive theory of local government. This theory viewed city government as largely a matter of municipal housekeeping and emphasized such objectives as clean streets, good schools, honest courts, efficient sewers, fair property taxes, potable water, and responsive police departments. Lee, *The Politics of Nonpartisanship* 28-29 (1960) (citation omitted). These objectives were not perceived to be political, and it was widely believed that "City government must, to be efficient, be emancipated from the tyranny of the national and state political parties." *Id.* at 29 (quoting Goodnow, *National Municipal League, A Municipal Program* 144-145 (1900). Lee concludes his description of the philosophy behind the nonpartisan system with a quote from Robert Wood:

> Finally, and most fundamentally, no-party politics implies some positive assumptions about political behavior that go beyond simple antagonism to partisanship. Inescapably, there is a belief that the individual can and should arrive at his political convictions untutored and unled; and expectation that in the final process of election and decision making a concensus will emerge through the process of right reason and by the higher call to the common good . . . the citizen, on his own, knows best. . . .
>
> As a theory, nonpartisanship harks back to the traditional concept of local government, to Jefferson's high expectations for the rational capacity of the yeoman, and to that strand in

---

[22] For additional insight into political corruption in American cities during this period, *see* L. Steffens. *The Shame of the Cities* (1904), M. Seasongood, *Local Government in the United States* (1934), and W. Bean, *Boss Ruef's San Francisco* (1952).

American political reasoning that relies on unfettered individualism.

Id. at 34 (quoting Wood, *Suburbia: Its People and their Politics* 157). This Jeffersonian ideal, with its stress on "the rational capacity of the yeoman" and unfettered individualism, is the very antithesis of the kind of paternalism condemned in *Eu*, 109 S.Ct. at 1020.

History thus reveals the practical and philosophical basis for California's judgment that permitting party organizations to become actively involved in "nonpartisan" elections would erode the concept of political independence on which such elections are based. Appellees suggest that, because the rampant and overt corruption that characterized turn-of-the-century political parties in California has abated, history is irrelevant. While the abuses we have described may no longer be as widespread,[23] this improvement may have been occasioned in part by removing the spoils from the grasp of the greedy—as the framers of our Constitution did with respect to the federal judiciary. We recall George Santayana's admonition: "Those who cannot remember the past are condemned to repeat it." Santayana, 1 *The Life of Reason* 2284 (1905). Guided by Santayana, we see the positive political climate produced by the reform movement not as something that makes history irrelevant, but instead as attesting to the sagacity of the reformers' impulse to restrict the activities of party organiza

[23] The potential for control of public officials by political parties or major economic interests is by no means an exclusively historical phenomenon. On the first page of the March 7, 1989 edition of the *Wall Street Journal*, the nation's top savings and loan regulator for the government in 1983 describes himself as the hand-picked "patsy" of the U.S. League of Savings Institutions. Jackson, *Waning Power*, Wall. St.J., Mar. 7, 1989, at 1, col. 6. As he discusses the current crisis in the savings and loan industry, the "patsy" says, "I was to do what [the U.S. League] wanted." *Id.* The article goes on to describe millions of dollars in political contributions to federal candidates, including large interest-free loans to the inaugural funds of the last three Presidents of the United States, prompting Congressman Henry Gonzales of Texas to say, "Everything the industry has wanted, Congress has rolled over and given it to them." *Id.*

tions in municipal, judicial, and school board elections. The durability and efficacy of a solution should not be used as a reason to ignore its raison d'etre. It is possible to debate the merits of the reforms of the Progressive Era, but it is not possible to deny the existence of the real and serious predicaments which they were designed to alleviate.[24] The concreteness of California's justifications for section 6(b) stands in favorable contrast to the lack of empirical evidence in *Munro v. Socialist Workers Party*, where the Court endorsed Washington's claim that restrictive ballot qualification laws were necessary for political stability despite the absence of proof of actual voter confusion, ballot overcrowding or the presence of frivolous candidacies. *See* 479 U.S. 189, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986).

Our discussion of the reform movement and the circumstances that gave rise to it thus leads us to the conclusion that California is warranted in believing that stronger measures than a "nonpartisan" label are necessary to ensure the political independence of the office to which the label attaches. Contrary to plaintiffs-appellees' claims that the passage of Proposition 49 "brought a *radical* change in the laws governing California's elections . . . ," section 6(b) is simply the most recent example of a conscious effort to make nonpartisanship a fact.[25] Plaintiffs-appellees' asser-

[24] With all due respect, Judge Canby's dissent suffers from the defect inherent in trying to identify or to classify an object by examining one of its fundamental characteristics without giving due consideration to others. There are important facets to Section 6(b) other than its First Amendment implications. The First Amendment is not absolute. It is for this reason that we use a balancing rather than a litmus test.

[25] California's consistent impulse to restrict the corrupting potential of party control over public officials has been described as follows:

> California is so large, its population so varied and mobile, and its society so diverse that it is difficult to generalize about the state's politics. Nevertheless, a certain recurring theme or leitmotif runs through that politics, an understanding of which brings some order to what otherwise appears senseless and unpredictable. The theme is perhaps best characterized by the term *antipartyism*. Primarily a legacy of the Progressive era of a half-century ago, antipartisym has been largely responsible for California's distinctive political character.

tion that some political party central committees in some parts of the state—but not others—have a history of encroaching on nonpartisan turf does not impeach this view. It only explains why Proposition 49 came to pass. It appears from the record that the passage of Proposition 49 was the people's way of reaffirming their strong commitment to the political independence of the judiciary, school boards, city and county government.

The question we now face is whether California is justified in taking this most recent step to safeguard the political independence of those who hold nonpartisan offices. To use the prescribed terms, we must determine whether section 6(b) is narrowly tailored to promote its intended aim of impartial administration of government. Although we perform this "least drastic means" analysis, we share Justice Blackman's discomfort with its utility:

> And, for me, "less drastic means" is a slippery slope. . . . A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down.

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 at 188, 99 S.Ct. 983, 992, 59 L.Ed.2d 230 (Blackmun, J., concurring); *see also Eu,* 109 S.Ct. at 1026 (Stevens, J., concurring); *Stevenson v. State Board of Elections,* 794 F.2d 1176, 1180 (7th Cir.1986) "It is not helpful to ponder what is 'less restrictive' without thinking about the functions the rules serve and how these functions would be affected by 'less restrictive alternatives.' *Every* alternative is more restrictive than some other one." (Easterbrook, J., concurring) (emphasis in original). Moreover, we share Judge Easterbrook's view that a "state need not choose a rule so much less restrictive that it also is useless in achieving the state's purposes." *Id. See also Storer,* 415 U.S. at 736, 94 S.Ct. at 1282 (" . . . the Constitution does not require the states to choose ineffectual means to achieve its aims.").

> In general, it involves a distrust of politics and the politician, a fear of strong political parties, and a conviction that political independence is a virtue.

Owens at 2.

Having issued this caveat, we now proceed to assess whether California is justified in perceiving partisan endorsements of candidates in nonpartisan elections to be incompatible with the political independence nonpartisanship seeks to preserve. History, the record in this case, and common sense lead us to share that perception. We believe the constitutional validity of the nonpartisan concept of government itself to be at stake here. For us to hold that a political party has a protected constitutional right to endorse, support, or oppose a candidate for nonpartisan office would be to ring down the curtain on state, local, and municipal nonpartisanship. We thus reject the notion, as did the California legislature and the people of California, that California's basic laws prohibiting political parties from nominating favored candidates for nonpartisan offices and providing for nonpartisan ballots are sufficient in themselves to protect California's brand of nonpartisanship.[26]

Unquestionably, with the demise of article II, § 6(b), political parties would establish regular and formal procedures pursuant to which candidates for nonpartisan offices could solicit endorsement and support and positions on "slate mailers," procedures whereby candidates and their views and qualifications could be—and most likely would be—questions and examined. It is extremely doubtful that such decisions to endorse or not to endorse would be ad hoc or arbitrary and capricious. Although it is difficult to predict the precise form in which these processes would appear, it is naive to believe that they would not. It is equally naive, we think, to believe that parties would rise above the temptation to support and endorse nonpartisan candidates with views incompatible with those of the party, many of which would be largely irrelevant to local government. On the other side of this coin, nonpartisan candidates would feel pressure to adopt views believed to be acceptable to the party whose money, machinery, and clout they sought to obtain. The substance of the nonpartisan process which California seeks to protect could easily be swept away by the political wind from which it is designed to be sheltered. We

---

[26] We reject plaintiffs-appellees' attempt to create a distinction between nomination and endorsement. Such a distinction strikes us as facile, and it ignores the substance of the issues at stake.

underscore once again that plaintiffs-appellees seek in this lawsuit, among other things, the right to place official political party and party central committee endorsements of nonpartisan candidates in the San Francisco voter pamphlet, an official government document that goes to each registered voter shortly before such election. This, in our view, would undercut the statutory prohibition against party nominations for nonpartisan offices to the point of rendering it useless.

We are persuaded both by history and the logic advanced by defendants-appellees and the *amici* that party endorsements would place local officials and judges in debt to the statutory political parties and that through the endorsement and support process, the political parties would indeed be able to close the door to elective office to independent-minded persons who refuse to toe the party line. It is likely that any process by which a major political party would decide whom to endorse—or support—would effectively determine who could and who could not run for that office. This is incompatible with California's rule that neither a party nor its central committee may nominate a candidate for nonpartisan office; and it is certainly the very essence of what nonpartisanship is designed to avoid.

We thus believe California to be justified in adhering to a bright-line approach to protecting its compelling interest. The First Amendment does not compel California to expand the vast and imposing array of intricate controls and restrictions on political activity already on the books in that state. Furthermore, we do not deem it prudent for the Federal Judiciary to conclude without the benefit of the legislative process that "California can adequately safeguard such [nonpartisan] interests . . . by other means."[27] We do not see that the "least restrictive means" test

[27] The policy choices in this area are complex and difficult. Not surprisingly, the experts do not agree either on what works or what is best. To illustrate this point, we turn again to R.F. Butts:

> But the questions about historical judgment are exceedingly difficult to answer. No simplistic amount of historical praise or blame of the Progressive era will do. Nagging questions persist. Was the loss of community control too high a price to pay for reducing corruption?

requires California to find the thinnest possible ice on which to skate or to search for a different pond. Insofar as the judiciary is concerned, California's approach is certainly a method of creating independence that is far less drastic than the method adopted by the Constitution of the United States. Federal judges have been removed altogether from the political fray. We suppose California could have originally adopted the same approach to selecting state judges to sit on the bench, investing them with life tenure and compensation protection.[28] Having chosen instead to require them to stand periodically for election or retention by the people, it seems reasonable to take measures to avoid control over their fate by political parties. Article II, § 6(b) accordingly strikes us as no more "paternalistic" than the federal approach to insuring the independence of the federal judiciary, and it is no more "paternal-

> Was the rise of professionalized expert management too high a price to pay for solving the problem of how to provide mass education to a whole population and for improving the quality of teaching through merit appointment and greater efficiency? Could corruption and inefficiency have been reduced without bureaucratization? Could diverse ethnic values have been brought into the process more constructively while at the same time improving the educative process? When settlement workers and teachers alike gave lessons in cleanliness and bathing to dirty immigrant children, were they simply imposing alien middle-class values on the working-class poor, or were they trying to improve the social and educational level of the impoverished prisoners of the urban ghetto?
>
> These questions can certainly be debated, but the fact remains that the centralizing of school organization and professionalizing of school administration did sweep the country as a result of the political processes of the Progressive era.

R.F. Butts, *Public Education in the United States: From Revolution to Reform* 179.

[28] *See Sailors v. Kent Board of Education*, 387 U.S. 105, 108, 87 S.Ct. 1549, 1552, 18 L.Ed.2d 650 (1967) ("We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election.")

istic" than the concept of a representative form of government as compared to a true democracy.[29]

Moreover, when examined in context, section 6(b) *is* narrowly drawn. It is limited in its coverage only to those concentrations of power that pose the greatest threat to the objectives of nonpartisanism. All other groups, individuals, and associations are free to do as they please. This protects the free expression and interchange of ideas that the First Amendment is designed to promote. We respectfully disagree that the statute is defective because it fails to include *all* groups or associations that may have an interest in nonpartisan elections. This is a strength of article II, § 6(b), not a fatal defect.

In addition, article II, § 6 (b) is not a law *aimed* at ideas themselves or specific information that California wishes to suppress although concededly it has this "indirect consequence." As such, it compares favorably with the statute at issue in *Eu,* 109 S.Ct. at 1016. It is a marginal and workable restriction on speech incident to a set of election rules designed to promote independence in public office.

Thus, section 6(b) is not the kind of substantial limitation or draconian restriction on free political exchange that rises to the level of incompatibility with the Constitution. With well-established principles of federalism embodied in the Tenth Amendment in mind,[30] we are loathe to order California to turn its back

---

[29] It has been argued that article IV, section 4 of the Constitution provides a textual basis for according considerable deference to the choices of the states regarding their political structures, etc. . . . We find the argument appealing but we do not use it as a basis for our decision. *See* Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L.Rev. 1 (1988). *See also Lance v. Plummer*, 384 U.S. 929, 86 S.Ct. 1380, 16 L.Ed.2d 532 (1966) (Black, J., joined by Harlan, J., dissenting).

[30] *See* The Federalist No. 45:

> "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised as external objects, as war, peace, negotiation, and foreign commerce. . . . . The powers reserved to the several states will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State."

cited in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 570, 105 S.Ct. 1005, 1027, 83 L.Ed.2d 1016 (Powell, J., dissenting).

on one hundred years of experience and to jettison a system that gives every appearance of serving its people quite handsomely.[31] California's elected legislators—all of whom are partisan politicians—must have agreed with this analysis or they would not have passed A.C.A. 7 which placed Proposition 49 on the ballot.[32]

---

[31] Justice Holmes put it well in 1922 when he said, "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . ." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31, 43 S.Ct. 9, 9-10, 67 L.Ed 107 (1922).

[32] Indeed, in arguing for Proposition 49, Assemblyman Mountjoy stated:

> Unless we specifically amend our State Constitution, political parties will dominate our historically nonpartisan judicial, county, and local election. Proposition 49 will reestablish the principle of nonpartisanism.
>
> The greatest danger in injecting political parties into the local elective process will be a not-so-subtle creation of a patronage network. The power of the state party leaders will no doubt increase greatly, opening the door for a centralized partisan power authority of incredible financial dimensions. In many Mid-western and Eastern states, the city, state, and county jobs are brokered by the political central committees. Could this happen in California?
>
> The opportunity will be there (without enactment of Proposition 49), and the temptation will be too great to resist. The financial and political force of state political parties can be directed toward local 46 and judicial elections.
>
> The distinctive quality of the California political process has been the independence of the California voter. To a great extent, Section 6 of Article II of our State Constitution has created that independence and kept the partisan fox out of the local elective hen house.

Statement of Richard L. Mountjoy as to Background and Purpose of Proposition 49, 1985 (on file in Assemblyman Mountjoy's office).

EQUAL PROTECTION

Plaintiffs-appellees also contend that article II, § 6(b) violates the Equal Protection Clause of the Fourteenth Amendment. To support this contention, they point out that section 6(b)'s provisions cover only political parties but not other potential endorsers and supporters—including numerous "unofficial" partisan organizations and special interest groups with a stake in nonpartisan offices and candidates. Because plaintiffs-appellees' claim concerns an abridgement of a fundamental constitutional right, the First Amendment, we are required to subject section 6(b) to strict scrutiny. "[A]ny classification which serves to penalize the exercise of . . . [a constitutional] right, unless shown to be necessary to promote a *compelling* government interest, is unconstitutional." *Shapiro v. Thompson,* 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969). *See also Dunn v. Blumstein*, 405 U.S. 330, 342, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972).

Our analysis of plaintiffs-appellees First Amendment challenge disposes—somewhat anticlimatically—of plaintiffs-appellees' equal protection contention. For all the reasons previously articulated in this opinion, we hold that article II, § 6(b) is necessary to defend adequately the nonpartisan objectives it was designed to shield. To strike down this part of California's constitution on the diaphanous assumption that there might be a less drastic method of achieving California's objectives would be to ignore the wisdom in the adage that the unintended consequences of an action are frequently far greater than that which was set out to be accomplished.

CONCLUSION

Article II, § 6(b) may be characterized as a law preventing the disruption of the nonpartisan political sector from without in order to permit the selection of candidates in that sector to take place in accordance with nonpartisan principles. We endorse this characterization of section 6(b), and in so doing we hold that it is a means as narrowly tailored as consistent with promoting the compelling state interest of impartially administered government.

REVERSED and REMANDED for further proceedings consistent with this Opinion.

SNEED, Circuit Judge, concurring separately:

I concur in Judge Trott's opinion.

I write only to comment on Judge Canby's discussion of Federalist No. 45. *See infra* at 1086 n.3.

It has become fashionable to reject arguments based on principles of federalism rooted in the Tenth Amendment by referring to the Fourteenth Amendment. Presumably the reference is to that portion of the first section of the Amendment containing the Due Process and Equal Protection Clauses as augmented by certain of the Bill of Rights. Perhaps I have missed something, but it is a fact that I have never read of the subject of nonpartisan elections being discussed by Congress in 1866 when it debated and passed the Fourteenth Amendment. More to the point, the context of these clauses has never been constant. That is not a criticism, only a statement reflecting the life of the law, yes, even constitutional law. Incorporation of portions of the Bill of Rights, for example, is a fairly recent development that perhaps may be, or already has been, extended to the Ninth Amendment. The content of the incorporated Bill of Rights also evolves over time.

In truth, when we, circuit judges, rely on the Fourteenth Amendment to curb the powers of a state, we are only relying on our perception of what the Supreme Court presently believes the Amendment requires. Judge Trott and I share a perception; Judge Canby has another. None of us has access to any stone tablets; yes, not even the Supreme Court.

CANBY, Circuit Judge, dissenting:

Judge Trott has written well, but there is a fatal infirmity in all of the reasoning that supports California's constitutional provision. California justifies its suppression of political party endorsements because the voters, if given such information, might choose to act upon it and cause political results that the State regards as untoward. That is precisely the kind of political paternalism that conflicts fundamentally with the first amendment. *See Eu v. San*

Francisco County Democratic Central Committee, ___ U.S. ___, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989).

Every single evil that the State seeks to avoid flows from electoral choice. One need only look at the majority opinion's dire prediction of the results that would follow from striking down California's ban on party endorsements.

> Unquestionably, with the demise of Article II, § 6(b), political parties would establish regular and formal procedures pursuant to which candidates for nonpartisan offices could solicit endorsement and support and position on "slate mailers," procedures whereby candidates and their views and qualifications could be—and most likely would be—questioned and examined. . . . It is . . . naive, we think, to believe that parties would rise above the temptation to support and endorse nonpartisan candidates with views incompatible with those of the party. . . . On the other side of this coin, nonpartisan candidates would feel pressure to adopt views believed to be acceptable to the party whose money, machinery and clout they sought to obtain. The substance of the nonpartisan process which California seeks to protect could easily be swept away by the political wind from which it is designed to be sheltered.

Majority opinion, supra at 1079. Of course, none of these events will come to pass if the voters pay no attention to major party endorsements. The key to all of the above developments is that *many voters attach meaning to a political party endorsement* and vote accordingly. Indeed, if the process described above in fact ensues, the voters will be quite correct. Parties will endorse candidates who adhere to the parties' principles, the candidates will seek to embrace those principles, and the voter will then know that the endorsement means something. *See Tashjian v. Republic Party of Connecticut*, 479 U.S. 208, 220, 107 S.Ct. 544, 551-52, 93 L.Ed.2d 514 (1986).

Other evils envisaged by the majority 1079 "that party endorsements would place local officials and judges in debt to the statutory political parties," and that party endorsement "would effectively determine who could and who could not run for that

office"—are similarly dependent upon the voters' positive reaction to the political endorsement.

To accept California's position, then, is to accept the proposition that the voters, in acting favorably upon a political party endorsement, are *making a mistake*. They are attaching too much meaning, or the wrong meaning, to the party's endorsement. Knowing that a particular party supports a candidate, the voters improperly vote for that candidate and give rise to too much party influence over local affairs. To combat this tendency, California could rely on independent candidates to try to convince the voters that they ought not to attach such importance to party labels. But California is apparently afraid that a majority of the voters will fail to be convinced. Consequently, it has taken a much simpler route: it has prohibited statutory political parties from endorsing (or otherwise supporting) candidates in nonpartisan elections, and from publicizing such endorsements. Under our Constitution, however, that option is not open to California. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S.Ct. 1817, 1829, 48 L.Ed.2d 346 (1976); *see also Anderson v. Celebrezze*, 460 U.S. 780, 798, 103 S.Ct. 1564, 1574- 75, 75 L.Ed.2d 547 (1983).

Much of the majority's opinion is taken up with explanations of the beneficial effects of nonpartisan elections and an appeal to pragmatism. Good things, we are told, have followed from nonpartisan elections—good things that would not have come about if the voters were exposed to one particular vein of political speech. We are presented with Holmes' statement that experience, not logic, has been the life of the law. There are several difficulties with this line of attack.

There are times when the law should accommodate to an existing condition and there are others when the status quo must yield to principle. The first amendment is perhaps our most fundamental assertion of principle, in a document that embodies the loftiest of norms along with the most pragmatic of compromises. Properly viewed, the first amendment protects free

expression as an end in itself. *See* L. Tribe, *American Constitutional Law* 576-79 (1978). But even under a narrower, instrumental view of the first amendment, there is an irreducible core requirement. It is that political speech must be free so that the sovereign people can decide public issues. To posit that the people may decide incorrectly, and therefore should be denied information in order to steer their decisions, is to posit some other sovereign who can decide when the people are likely to be mistaken, and what they should be allowed to know. Little would be left of the first amendment under such a regime. If we are to draw a principle from Holmes, then, it should be "that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (dissenting opinion). *See also Gitlow v. New York*, 268 U.S. 652, 673, 45 S.Ct. 625, 632, 69 L.Ed. 1138 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way").

That California is suppressing expression because of its communicative impact is enough to invalidate its action in the absence of such an imminent danger "that an immediate check is required to save the county." *Abrams*, 250 U.S. at 630, 40 S.Ct. at 22 (dissenting opinion); *see* Tribe, *supra* at 581. None of the political evils described in the majority opinion rise to that level. Indeed, it is not even clear that the evils, which are themselves well documented, were caused by political party endorsements or were cured by their suppression. I am not convinced, for example, that the influence of the Southern Pacific Railway in California politics would have been noticeably diminished if the local governments with which the railroad dealt had been elected without partisan support. Nor, I suggest, would it have been constitutional for California to solve the problem of Southern Pacific dominance by prohibiting the Railway from announcing its support for particular political candidates. *See Buckley v. Valeo*, 424 U.S. 1, 39, 96 S.Ct. 612, 644, 46 L.Ed.2d 659 (1976). Why should it be able so to restrict political parties?

Indeed, two themes seem to run throughout the majority's review of California political history: first, that California voters have a strong tradition of anti-party independence and, second, that if candidates are endorsed by political parties, the California voters will overwhelmingly vote for party candidates to the exclusion of independents. Putting the anomaly aside, the majority opinion would favor the first tendency by permitting California to prohibit the second. Underlying that choice, of course, is the conclusion that nonpartisan candidates make "better" local officials than partisan ones do.[1] That proposition is not self-evident, nor is the proposition that the interests of national political parties are irrelevant to local issues. There may be no Republican, or Democratic, or Libertarian way to build a city jail, but there may very well be Republican, Democratic or Libertarian positions on whether a jail should be built and who should be taxed for it. It is not necessarily bad government for voters to elect an official because of his partisan position on such an issue, nor for the official to feel committed to the position that got him elected. *See Brown v. Hartlage*, 456 U.S. 45, 58, 102 S.Ct. 1523, 1531, 71 L.Ed.2d 732 (1982). In any event, there is no need to decree the superiority of either the partisan or the nonpartisan local official; the voters can make that decision at each election.

Because the majority opinion is insufficiently sensitive to the point that a state may not suppress communication because of its communicative impact, it falls into other error. For example, it concludes that California's constitutional provision "is not a law *aimed* at ideas themselves or specific information that California wishes to suppress although concededly it has this 'indirect

---

[1] This assumption that nonpartisan candidates are "better" seems to underlie the conclusion of the majority opinion, *supra* at 1065, that California's prohibition of endorsements is to be treated sympathetically because it "opens" the political process to diverse interests, rather than clogging it. A diversity of viewpoints in a legislative body may or may not be a good thing, but it is not clearly beneficial or consistent with the first amendment to suppress expression in order to bring it about. To open a system by favoring independents is to close it for the disfavored partisan candidates. Which should be elected should be left to the voters, once they are permitted to know one from the other.

consequence.' " *Supra* at 1081. California's provision, however, forbids parties to "endorse, support, or oppose a candidate for nonpartisan office." The whole thrust of the majority's opinion is that a party endorsement conveys information that the state does not want to go to the voters, because they will act upon it. Article II, § 6(b) is intended to suppress that information. It is quite backward to characterize California's law as one directed at corruption and other political evils, with an indirect effect upon speech. The State's measure is directed at the content of speech, in order indirectly to achieve political consequences. That is its prime flaw.

It is also a mistake to equate political endorsement with control of the nomination process. *Supra* at 1079 n. 26. If the two are equivalent, it is only because of the effect of the endorsement on the minds of the voters. If that forbidden consideration is removed, the two categories are quite distinct. Nothing in the first amendment prevents California from establishing an open nomination totally apart from party direction. Access to the ballot can be achieved by collection of signatures, or by some other neutral method. Such a system will permit California to achieve all the virtues it has attributed to nonpartisan office holding, if the voters agree with its goal.

The fact that California's prohibition is aimed only at statutory parties and their central committees is hardly a saving grace. Those entities, as well as their members, enjoy rights of free speech and free association. *Eu,* 109 S.Ct. at 1020. Nor is much to be gained by the majority opinion's emphasis on the fact that the parties seek to place their endorsements in the San Francisco voter pamphlet, an official governmental publication. San Francisco has chosen to open its voters' pamphlet to endorsement by other groups; it denies access only to the statutory parties and their central committees, as the California constitutional provision dictates. The first amendment does not require San Francisco to distribute any endorsements at all, but that is not the issue in this case. The issue is whether California can prohibit party endorsements, and their distribution. For reasons already stated, the clear answer is "no," and the answer is certainly made no less

clear by the fact that California singles out political parties and permits endorsement by all others.[2]

Finally, a word about judges. It is true that the evils of partisanship appear to be greater in the case of judges than of other officials, because it is far from clear that decisions of judges ought to be responsive to the desires of the electorate, partisan or otherwise. "It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents." *Clements v. Fashing,* 457 U.S. 957, 968, 102 S.Ct. 2836, 2846, 73 L.Ed.2d 508 (1982). The political threat to judicial independence, however, is attributable far more to the decision to elect judges in the first place, and to subject them to reelection, than it is to party endorsement. Having made that choice, the state is not free to prevent political parties or anyone else from announcing their support of a candidate; the first amendment does not permit the suppression of such information. Although the state interest is higher in the case of judges than of legislators, because of the difference in their functions, suppression of speech is too high a price to pay to advance that interest. *See Unger v. Superior Court,* 37 Cal.3d 612, 622-24, 209 Cal.Rptr. 474, 481-82, 692 P.2d 238, 244-45 (1984) (Grodin, Acting C.J., concurring). Other electoral devices, such as unopposed elections on the question of retention, long terms, or appointment are better constitutional routes to judicial independence.

Conclusion

The decision of the majority in this case permits California to suppress political expression because the voters might misuse the information. Our entire first amendment jurisprudence is to the contrary.

---

[2] My view of the first amendment issues in this case makes it unnecessary for me to reach the question of equal protection, where the California provision is equally suspect.

Most recently, in *Eu,* the Supreme Court struck down California's ban on pre-primary endorsements by political parties. The Court stated:

> California's ban on primary endorsements . . . prevents party governing bodies from stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought. This prohibition directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about candidates and the campaign issues.

Eu, 109 S.Ct. at 1020. The Court then firmly rejected California's paternalistic approach despite the reasons, including the danger of voter "confusion," offered in support of the prohibition. *Id.* at 1020-23.

The reasoning and result in *Eu* transfer easily to this case. The first amendment prevents California from suppressing information that its voters might use. The district court understood that point and stuck California's provision down. I would affirm its ruling.[3]

---

[3] The view of federalism cited by the majority opinion and drawn from Federalist No. 45, supra, at n. 28, need not deter us from invalidating the California constitutional provision. The notion that federal concerns are directed toward external affairs, while the tenth amendment reserves to the states the concerns over liberties of the people, was advanced at a time when the Bill of Rights did not apply to the states. The division of powers Federalist No. 45 envisaged was radically altered by the fourteenth amendment, enacted in the aftermath of the Civil War. "We must consider what this country has become in deciding what [The Tenth] Amendment has reserved." *Missouri v. Holland,* 252 U.S. 416, 434, 40 S.Ct. 382, 383-384. 64 L.Ed. 641 (1920). Nothing in our federalism as it exists today suggests that States should be the sole judges of the degree to which first amendment expression can be restricted.

Appendix C

Bob GEARY; Robert Silvestri; Dennis Mark; Melissa Gundrun; Wayne Johnson; David Soule; Max Woods; Peter Johnson; Robert Gebert; Election Action; Terence Faulkner; and Sudi Trippet, Plaintiffs-Appellees,

v.

Louise RENNE, San Francisco City Attorney; Dianne Feinstein, San Francisco Mayor; Board of Supervisors, City and County of San Francisco; City and County of San Francisco, and Jay Patterson, San Francisco Registrar of Voters, Defendants-Appellants.

No. 88-2875.

United States Court of Appeals,
Ninth Circuit.

Feb. 6, 1990.

Before GOODWIN, Chief Judge, and BROWNING, WALLACE, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, LEAVY, TROTT, FERNANDEZ and RYMER, Circuit Judges.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

Appendix D

Bob GEARY, Robert Silvestri, Dennis Mark, Melissa Gundrun, Wayne Johnson, David Soule, Max Woods, Peter Johnson, Robert Gebert, Election Action, Terence Faulkner and Sudi Trippet, Plaintiffs,

v.

Louise RENNE, San Francisco City Attorney; Dianne Feinstein, San Francisco Mayor; Board of Supervisors, City and County of San Francisco; City and County of San Francisco, and Jay Patterson, San Francisco Registrar of Voters, Defendants.

No. C 87 4724 AJZ.

United States District Court,
N.D. California.

April 27, 1988.

ORDER PARTIALLY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT

ZIRPOLI, District Judge.

Plaintiffs in this case are 10 registered voters of the City and County of San Francisco, and organization of registered voters of said city, and an officer of said organization. Plaintiffs Bob Geary, Robert Silvestri, Dennis Mark, Max Woods, and Terence Faulkner are all members of Democratic or Republican county central committees. Plaintiff Faulkner is Chairman of the San Francisco Republican County Central Committee.

Defendants herein are the City and County of San Francisco, and some officials of said city and county, including the registrar of voters.

In their Third Cause of Action, plaintiffs challenge the constitutionality of California Constitution, Article II, Section 6(b), which prohibits political parties, and their central committees, from endorsing, supporting, or opposing candidates in local, school, and judicial elections. Plaintiffs claim—and defendants admit—that defendants refuse to permit political party and politi-

cal party central committee endorsements of candidates for such offices to be printed in the San Francisco voter's pamphlet on account of said state constitutional provision. Plaintiffs contend that the challenged state constitutional provision abridges their rights under the First and Fourteenth Amendments to the United States Constitution, as well as under 42 U.S.C. section 1983, and have moved for summary judgment on such claims.

Said summary judgment motion has been fully briefed and argued by the parties. Having carefully reviewed the record in this matter, the Court finds that no genuine issue exists as to any material fact with respect to plaintiffs' Third Cause of Action, and that plaintiffs are entitled to judgment as a matter of law.

In reaching this conclusion, the Court considers the concurring opinion of Justice Grodin in *Unger v. Superior Court* (1984) 37 Cal.3d 612, 620-625, 209 Cal.Rptr. 474, 692 P.2d 238, to be highly persuasive. In *Unger*, the California Supreme Court was asked to determine whether the language of California Constitution, Article II, Section 6, barred political party endorsements in judicial races prior to a 1986 amendment to said state constitutional provision which added an express endorsement ban. A majority of the California court ruled that the pre-1986 version of the state constitutional provision did not ban such endorsements. In his concurring decision, Justice Grodin opined that such an endorsement ban would violate the First and Fourteenth Amendments to the United States Constitution:

> Under real parties in interest' interpretation, article II would flatly prohibit a qualified political party from expressing any views concerning a judicial candidate's qualifications, competence, or record. The tension between such an absolute prior restraint on pure political speech and traditional First Amendment principles is obvious and palpable.
>
> There can be no doubt that such a prohibition strikes at the heart of the First Amendment. As the United States Supreme Court stated in *Buckley v. Valeo* (1976) 424 U.S. 1 [96 S.Ct. 612, 46 L.Ed.2d 659] . . .: "Although First Amendment protections are not confined to the 'exposition of ideas,' 'there is practically universal agreement that a major purpose of that

Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussion of candidates. . . . This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot v. Roy* [(1971) 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35] . . . 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.' " (Id. [424 U.S.] at pp. 14-15 [96 S.Ct. at 632]

Nor can there be any doubt that the First Amendment protects political association, including association through political parties . . . and that '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." . . .

> Because article II, if interpreted as real parties in interest urge, would absolutely prohibit the expression of any opinion by or through a political party concerning candidates for certain public offices, it could be upheld only if the government can demonstrate that the provision furthers a compelling state interest and is narrowly drawn to avoid unnecessary abridgement of First Amendment rights. . . . No such demonstration exists on this record.

Id., at pp. 621-622, 209 Cal.Rptr. 474, 692 P.2d 238, footnotes omitted.

The Court agrees with the reasoning of Justice Grodin. While the State of California may have a legitimate interest in maintaining the nonpartisan character of local, judicial, and school elections, Article II, Section 6(b) of the California Constitution is not a narrowly drafted enactment designed to advance such interest by the least drastic means. On the contrary, California can adequately safeguard such interests by providing for nonpartisan methods of nomination of candidates for such offices and by

controlling partisan activities of the candidates—for example, by prohibiting candidates for such offices from soliciting or collecting campaign funds from political parties. Indeed, it appears that California has already taken steps in this direction by adopting nonpartisan nomination methods for all local, school, and judicial offices. See e.g. Cal.Elec.Code Secs. 6400 et seq., 22600 et seq., and 23500 et seq.; Cal Const., Art. VI. Sec. 16; San Francisco Charter Secs. 9.100-1 and 9.104.

Furthermore, defendants have not made any showing why California has a compelling interest in supressing endorsements or discussion of candidates for local, school and judicial offices, by political parties and their central committees, but permitting such advocacy and endorsements by other groups, including partisan organizations and special interest groups. The Court agrees with Justice Grodin that: "The fundamental difficulty with [defendants'] position is that essentially the same arguments . . . can be made with respect to endorsements by other groups—unofficial political parties or partisan organizations, as well as special interest groups—who would remain free to express their views and to vigorously support or oppose any candidate for [local, school, or] judicial office. The possibility that a judge [or local or school official] will appear beholden to particular interests, and the possibility that the public will be unduly influenced by a particular endorsement, are both risks inherent in a system which call upon judges [and local and school officials] to run for office. It does not appear, at least from this record, that partisan endorsements pose such a substantial and unique threat as to justify the limitations upon freedom of expression posed by [Cal. Const., Art. II, Sec. 6(b)]. *Unger, supra,* 37 Cal.3d at p. 624, 209 Cal.Rptr. 474, 692 P.2d 238 (con. opn. of Grodin, J.), footnotes omitted.

GOOD CAUSE APPEARING THEREFOR and for the reasons stated by the court in this order,

IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment as to the THIRD CAUSE OF ACTION is granted, and that:

(a) California Constitution, Article II, Section 6(b) is hereby declare violative of the First and Fourteenth Amendments to the United States Constitution, as well as of 42 U.S.C. section 1983.

(b) Defendants and their officers, agents, servants, employees, and attorneys and other persons acting in concert or participation with defendants are hereby permanently restrained and enjoined from enforcing or seeking to enforce California Constitution, Article II, Section 6(b);

IT IS HEREBY FURTHER ORDERED that pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Court hereby expressly determines that there is no just reason for delay of entry of a final appealable judgment for plaintiffs as to the THIRD CAUSE OF ACTION, and hereby expressly directs the Clerk of the Court to enter this forthwith as a final judgment for plaintiffs as to the THIRD CAUSE OF ACTION.

IT IS SO ORDERED.